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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 387

WILLIAM WALTER REMINGTON,
Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, William Walter Remington, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinion Below

The opinion of the Court of Appeals has not yet been reported, but is printed as Appendix B to this petition for the convenience of the Court (pp. iii-xiv).

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on August 22, 1951. On September 20, 1951, Mr. Justice Jackson extended the time for filing a petition for writ of certiorari to and including October 20, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

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Questions Presented

1. Whether an indictment is invalid where the foreman of the indicting jury, at the very time the indictment was returned, was acting as the financial and literary collaborator of the chief prosecution witness in a book-publishing venture whose success depended upon the defendant's indictment.

2. Whether an indictment is valid when it so far fails to describe the offense charged that the court below was compelled to say that "the defendant did not know even at the end of the government's case what he had to meet.

3. Whether in a perjury case, it is essential that the government prove that the defendant had in fact testified falsely, or whether it is only necessary to prove that the defendant "believed" he had testified falsely.

4. Whether a conviction of perjury for denying membership in the Communist Party can be sustained when the government admits that it has no evidence whatever of an act of joining the Party.

5. Whether the "direct evidence" rule in a perjury case requires the government to produce direct evidence of the fact of defendant's membership in the Communist Party, or whether the rule requires only "direct evidence" of "overt acts" from which the jury might "infer" defendant's' "belief" that he was not telling the truth.

Statute Involved

18 U.S.C. §1621:

> "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 773."

Statement

Petitioner was indicted on June 8, 1950 for alleged violation of the perjury statute, 18 U.S.C. Section 1621. The indictment was in a single count, and alleged that the petitioner appeared before a grand jury in the Southern District of New York on May 25, 1950, and, being duly sworn, testified as follows:

"Q. At any time have you ever been a member of the Communist Party? A. I have never been."

It was further alleged that the question was material and that the "testimony of the defendant, as he then and there well knew and believed, was untrue in that the defendant had been a member of the Communist Party". There is no allegation in the indictment as to when or where the defendant is alleged to have been such a member, although in a bill of particulars the government alleges that the defendant was a member of the Communist Party at five separate and distinct and, as amended, consecutive periods between 1934, when the defendant was sixteen years of age, and 1944.

On June 13, 1950, petitioner pleaded not guilty. A trial before District Judge Gregory F. Noonan and a jury, began December 18, 1950. The case was submitted to the jury February 7, 1951, at 4:20 P.M., and a verdict of guilty was returned February 7, 1951, at 10:10 P.M. Judgment was entered February 8, 1951, and petitioner was sentenced to five years imprisonment and fined $2,000.

Petitioner filed notice of appeal from the judgment of the trial court February 8, 1951, and argued his appeal June 15, 1951 before Swan, C.J., A. N. Hand, and L. Hand, JJ. On August 22, 1951 the Court of Appeals for the Second Circuit reversed the judgment of the District Court and remanded the cause.

In reversing the judgment of conviction and remanding the cause to the District Court, the court held, *inter alia*, that the judge's charge to the jury had been fatally defective. However, the Court of Appeals made certain decisions and announced certain rules concerning the trial of a perjury case, as set forth in the following "Specification

of Errors to be Urged", which we believe should be reviewed by this Court at this time because of their great public importance and because some of them raise issues which are "fundamental to the further conduct of the case" (*United States* v. *General Motors Corp.*, 323 U. S. 373, 377 (1945)).

While a general review of the evidence contained in the record* is unnecessary for a decision of the issues raised by this petition, nevertheless, in view of the complexity of the case and the voluminous nature of the evidence, we believe that a bare outline of the basic facts underlying the case might aid the Court in following the argument.

This case had its origin in charges first made to the F.B.I. in the latter part of 1945 and later repeated before Congressional committees in 1948 by one Elizabeth T. Bentley, a confessed former Communist spy. She charged that the defendant was one of many persons employed by the government who had given her secret government information between the years 1941 and 1944, and that he had been a member of the Communist Party. When these statements were repeated in a radio broadcast, the defendant sued Bentley for libel. On February 19, 1950, he recovered $9,000 in settlement of this suit from the radio station and the sponsor (R. 1372-82). Shortly thereafter the present indictment was returned.

The defendant was born in New York City in 1917 and was brought up at his family home in Ridgewood, New Jersey. After graduating from high school in Ridgewood he entered Dartmouth College, Hanover, New Hampshire, in 1934, at the age of 17. In its bill of particulars the government alleges that he was a member of the Communist Party at five separate periods, covering ten years

* Because of financial inability to print the record, which includes a 4,045 page transcript of the trial, petitioner submits with this petition a motion to dispense with the printing of the record for purposes of considering this petition for certiorari. (See Appendix A.) All references to the record in this petition refer to the certified typewritten transcript which is filed herewith.

of the defendant's life, beginning with his entry at Dartmouth. For convenience, we shall follow these specifications in this outline:

(1) 1934-1936 at Hanover, New Hampshire. This covers Remington's freshman and sophomore years at Dartmouth College when he was 17 and 18 years old. Although the defendant conceded that he had been very radical during these years, no probative evidence in support of the allegation that he had been a member of the Communist Party during this period was introduced, and it was withdrawn from the jury at the close of the whole case with the consent of the government (R. 4026).

(2) 1936-1937 at Knoxville, Tennessee. During the academic year between his sophomore and junior years, Remington took a leave of absence to work as a messenger with the Tennessee Valley Authority at Knoxville, Tennessee. Although a considerable number of witnesses, nearly all former Communists, testified to various alleged communistic activities of the defendant during this period, the government in the court below conceded that the only direct evidence of membership at Knoxville was that the defendant had had access to a post office box which a former Communist organizer testified had been a Communist Party box. We shall argue hereafter that as a matter of law this was not "direct evidence" of membership.

(3) 1937-1939 at Hanover, New Hampshire. Remington left Knoxville in the end of June 1937, spent the summer with his family, and returned to Dartmouth as a junior in the fall of 1937, graduating in June of 1939 (R. 312). In the spring of his junior year he met Ann Moos, a student at Bennington College, Bennington, Vermont. They were secretly married in New York in November 1938 and later at a public religious wedding at the house of the bride's mother, Mrs. Elizabeth Moos, in Croton-on-Hudson. During the summer of 1939 they went to Mexico on a honeymoon trip. This was an unhappy marriage, ending in separation in 1947, accompanied by considerable

acrimony, and a divorce in 1949. Mrs. Remington testified at the trial for the government. Although she was extremely hostile, she admitted that her husband was not and could not have been a member of the Communist Party during his junior and senior years at Dartmouth (R. 304, 267). Since the trial, the government has conceded that it had no direct evidence of membership during this period. However, defendant's request to withdraw this period from the jury was denied by the trial court (R. 3811, 3733, 3747-8).

(4) 1939-1940 at New York City. During the academic year following his graduation from Dartmouth the newly-married Remingtons lived in New York while the defendant studied for a master's degree in economics, at Columbia. They visited Mrs. Moos' house in Croton quite frequently. Mrs. Moos was becoming quite radical, and at some time became a Communist (R. 447-8). She is now under indictment for failing to register as a Russian agent. At the Moos house, Remington met a number of Communists, particularly one Joe North, an editor of the New Masses. Mrs. Remington testified that during this period, though she says they were members of the Communist Party, they had no formal contacts with the Party (R. 442). "Membership" to her was a "state of mind" (R. 200, 202, 206, 283, 294). Since the trial, the government has admitted that it had no direct evidence of membership during this period. However, the defendant's request to withdraw this period from the jury was denied by the trial court (R. 3812, 3733, 47-8).

(5) 1940-1944, Washington, D. C. In the spring of 1940 the Remingtons moved to Washington, D. C., and Remington began working for the United States Government and continued working for the government in various capacities until after his indictment on June 8, 1950.

In the early winter or spring of 1942 the Remingtons met Miss Bentley in New York through a friend of Joe North. Thereafter, for two years Remington saw Bentley from time to time in Washington and gave her certain

information. He says he believed that she was a research worker for various writers and that he gave her only such information as would be proper under the circumstances. Bentley claims he knew she was a Communist and gave her secret information, although she admits he did not know she was a spy or that the material he gave her was going to Russia (R. 1163-8). Mrs. Remington indicates that he did know the material was going to Russia. A large portion of the record is taken up with conflicting testimony as to whether the information he gave her was secret. Both women testified that he paid "dues", although their testimony is very indefinite and far from direct. It is the only testimony in the record, other than the post office box, which the government contends constituted direct evidence of membership. We shall argue hereafter that as a matter of law it was not "direct".

In 1944 Remington stopped seeing Miss Bentley and enlisted in the Navy. Both Remington and Miss Bentley agree he stopped seeing her because he became suspicious of her (R. 2632, 1167, 1259-61). There is no claim that he was a Communist after 1944. Between that date and the time of the indictment, the uncontradicted evidence is that he repeatedly opposed Russian and Communist interests in his official acts and duties, as well as in private conversation (R. 3140-3, 3093-4, 2646-58), as indeed some of the evidence indicates he has done throughout his adult life.

The foregoing is intended to be only a very brief indication of the factual background of this case. The record, comprising 4,045 typewritten pages, contains a welter of evidence relating to various incidents indicating that the defendant associated with Communists, that he was either a "Red" or a "fellow traveler", that he had given Bentley secret government information, and, that when he was 18 or 19 years old he told people he was a Communist. But it is not necessary to discuss that evidence for the purposes of this petition. The only issues raised by this petition which require any understanding of the record relate to the history of Bentley's charges and her associ-

ation with the foreman of the indicting grand jury, and the two items of evidence above referred to which the government contends constitute direct evidence and which we contend, as a matter of law, do not.

Specification of Errors to be Urged

The Circuit Court of Appeals erred:

(1) In failing to dismiss the indictment on the ground that the foreman of the indicting grand jury, at the very time the indictment was returned, was the financial and literary collaborator of the chief prosecution witness in a book-publishing venture whose success depended upon the defendant's indictment.

(2) In failing to dismiss the indictment for failure to set forth the essential facts constituting the offense charged, particularly in view of the statement of the court below that "the defendant did not know even at the end of the government's case what he had to meet".

(3) In affirming the denial by the District Court of petitioner's motion for judgment of acquittal, in spite of the government's concession that it had no evidence of an act of joining and of the fact that the only two items of evidence on which the government relied to sustain the conviction fail as a matter of law to satisfy the rules applicable in perjury cases.

(4) In holding that in a perjury case it is not necessary for the government to prove that the defendant had in fact testified falsely, but only to prove that the defendant "believed" he had testified falsely.

(5) In holding that a defendant can be convicted for perjury for denying membership in the Communist Party when the government admits that it has no evidence whatever of an act of joining the Party.

(6) In holding that the "direct evidence" rule in perjury cases does not require direct evidence of the fact of defendant's membership in the Communist Party, and

in further holding that the rule only requires direct evidence of "overt acts" from which the jury might "infer" the defendant's "belief" that he had been a member of the Party.

Note: In the event that the writ is granted, petitioner would wish to reserve the right to argue, in presenting the case as a whole, an additional error of the Court of Appeals relating to the government's abuse of the grand jury process by calling fifteen witnesses, or potential witnesses, including several who had been subpoenaed by the defendant, before grand juries other than the indicting grand jury after the indictment had been returned, for the purpose either of intimidating them or obtaining an ex parte examination before trial.

REASONS FOR GRANTING THE WRIT

I

The decision of the Court of Appeals refusing to dismiss the indictment despite the fact that the foreman of the indicting grand jury was the financial and literary collaborator of the chief prosecution witness conflicts with the applicable decisions of this Court and constitutes an important question of federal law involving the integrity of the judicial process which should be settled by this Court.

The dangerous and startling situation presented by this petition can be summarized as follows:

(1) At the time of the indictment, the foreman of the indicting grand jury, one John Brunini, was collaborating with the chief prosecution witness, one Elizabeth T. Bentley, in the preparation and publication of a book in which she repeated her accusation that the defendant had been a member of the Communist Party and the success of which depended upon Remington's indictment.

(2) The prosecution's case was presented to the grand jury by Mr. Thomas E. Donegan, a Special Assistant to the Attorney General, who had previously been Bentley's personal attorney in a litigation arising out of her espionage activities.

(3) One of the first witnesses before the grand jury was Mr. Joseph A. Egan, Bentley's present personal counsel, who did not know Remington but had represented Bentley in the preparation of the defense of a libel suit based on her charge that Remington was a Communist, and whose testimony could only have been incompetent and prejudicial.

(4) Brunini and Donegan interrogated Remington, during a five-day grilling before the grand jury, on matters many of which were wholly unrelated to any crime, but directly related to the public dispute between Bentley and Remington as to whether he had ever been a member of the Communist Party, and finally asked him the crucial question, for the denial of which he was indicted.

(5) The United States Attorney deliberately withheld information concerning the collaboration of Bentley and Brunini from defendant's counsel and then sought to suppress the evidence when it became known to defendant's counsel from other sources.

The refusal by the court below to dismiss an indictment so procured threatens the maintenance of minimum standards of decency in the grand jury system and in the conduct of government prosecutions. The issue presented to this Court is nothing less than the integrity of the constitutionally-protected grand jury system. Because of the importance of that issue and the significance of the origin and background of this prosecution, as well as our inability to print the record because of lack of funds, we feel it our duty in this petition to present the facts in considerable detail. We ask the Court's forbearance with the length of our presentation of this point.

A. Bentley's activities as a spy.

In the latter part of 1945, one Elizabeth T. Bentley confessed to the F.B.I. that she had been a member of the Communist Party, a member of a Russian spy ring, and the willing tool and paramour of its head man. She charged that this defendant, among many others, was a member of the Communist Party and had given her information obtained from government files, which she trans-

mitted to Russia. *Her story,* repeated in public before an investigating committee of the United States Senate on July 30, 1948, and again in large part at the present trial, is briefly as follows:

She joined the Communist Party when she was a graduate student at Columbia University in March, 1935 (R. 1045). In 1938 she was put in contact with one Jacob Golos, and began doing research work for him, believing that she was helping him collect research material for writers on the Communist publication "New Masses" (R. 1048-49, 1139-41). After about a year or more, she discovered that Golos was really a Russian spy; but by that time she had become his mistress and she continued collecting information for him even though she now knew she was herself engaged in espionage (R. 1140-42). In 1941, she began working as a courier for Golos' spying activities, obtaining information from various government employees in Washington and bringing it to Golos for transmission to Russia (R. 1056-58). In the course of these operations she came in contact with various important government employees, and particularly with a group described by her as the "Silvermaster group", who were employed in various government departments, including the Treasury and even the White House itself (R. 1149-51). This group microfilmed all kinds of highly secret documents, which she collected for Golos every two weeks (R. 1152, 1155-59); through this group she learned such top secret information as advance plans for B-29 raids (R. 1157); the date of D-Day for the invasion of Normandy (R. 1158); and the fact that the government was about to break the Russian code (R. 1158).

In addition to the Silvermaster group, she had other sources, including a number of individual contacts who gave her information (R. 1161). Among these was Remington, who had been introduced to her by Golos, and whom she described as a "minor figure", one of the "least important" of her contacts (R. 1213) who did not know the material he gave her was going to Russia (R. 1166-7).

Golos died in November, 1943 (R. 1261). Bentley asserted that she went to the F.B.I. with her story in August,

1945, because her conscience was bothering her (R. 1169, 1289-92). But at the trial it developed that it was less her conscience that took her to the F.B.I. in August, 1945, than it was to inquire about a man whom she had recently met at the St. George Hotel in Brooklyn. This became evident when the defense introduced in evidence (Ex. T) a letter from the F.B.I. to Bentley, dated October 8, 1945 —almost two months after the August interview—which indicated that at that time the F.B.I. was interested solely in whether this man was impersonating an F.B.I. agent (R. 1336-9). On October 11, 1945, Louis Budenz, a Communist who had been associated with Bentley in some of her activities (R. 1296-1297), publicly announced that he had left the Party (R. 1343-4). We think it is apparent that it was not until after the Budenz revelations that Bentley began to tell the story of her own spying activities. But, be that as it may, she gave whatever information she had about herself and about Remington to the F.B.I. during the latter part of 1945 or early in 1946. No steps have ever been taken to bring Bentley to justice for her confessed crimes.

B. The beginning of the Remington investigation.

On April 15, 1947, about a year and a half after Bentley's "confession", three F.B.I. agents called on Remington and interviewed him for 3½ hours (R. 3248). Thereafter there were two other interviews.

In June 1947, Bentley told her story to a grand jury in New York (R. 1170). The defendant was also called before that grand jury and testified voluntarily and at length about his relations with Bentley and matters relating thereto (R. 2622-7, 2661-2). No indictment was returned against either Bentley or Remington or against any of the other persons publicly accused by Bentley (R. 1300-5).

C. Bentley supports herself by writing and lecturing about her unpunished criminal activities.

In the spring of 1948, Bentley called upon Mr. Frederick Woltman, a prominent writer on the New York World Telegram, to find out when the grand jury to which she had told her story was going to return indictments, for she thought the grand jury had taken "a long time" (R.

1305, 1316). Woltman put her in contact with Mr. Nelson Frank, also of the New York World Telegram, and she entered into a contract with Frank whereby he would be her literary assistant and would share with her the proceeds of any writings based upon her disclosures (R. 1306-9).

In July 1948, Frank wrote a series of sensational articles about Bentley for the World Telegram (R. 1309-12, Ex. S). Immediately thereafter, on July 30, 1948, she testified about her contacts with Remington before an investigating Committee of the Senate (R. 1312). A day or two after that she testified before the House Committee on Un-American Activities about many of her other espionage activities (R. 1313-5).

Since these public appearances in July, 1948, Bentley has supported herself most of the time by lecturing and writing about her experiences as a Communist spy (R. 1348-50). For the past year she has been engaged in writing a book on this same subject (R. 1350) in which she repeats her accusations against this defendant as well as others of her alleged spy ring (R. 1352). The book was serialized in McCall's magazine earlier this year and is presently available in all bookstores. She herself referred to the book as her "livelihood" (R. 1419-20). It is apparent, therefore, that the circumstances which will now be related must have been extremely damaging to her "career" as a writer and lecturer.

D. Doubt is cast on Bentley's story.

Despite Bentley's statements to the F.B.I. in 1945 and to the grand jury in 1947, Remington remained continuously in government employ, rising successively from one important position to another (R. 2641-61). Apparently Remington, with one possible exception (R. 1315), was the only person still in government service when Bentley, in 1948, made her public accusations against her 30 or so government contacts (R. 1313-5). On February 9, 1949, the defendant was publicly cleared by the Loyalty Review Board of loyalty charges based on Bentley's accusations and restored to his position at the Department of Commerce (R. 1355-9). His case received so much public notice that it

was natural for the issue of Bentley's credibility to focus on whether she was right about Remington.

In addition to Remington's clearance by the Loyalty Review Board, an even more serious threat to Bentley's career as a lecturer and writer arose. After her public appearance before the Senate Committee in 1948, Bentley repeated her accusations against Remington in public over a television network (R. 1352-4). He promptly sued her, as well as the television network and the program sponsor, for libel (R. 1354, 1369-72). After examination before trial of Bentley and considerable investigation of the facts by the attorneys for herself and her co-defendants (R. 1391), the television network and the sponsor settled the libel suit in February, 1950, by paying Remington $9,000 (R. 1372, 1382).

This then was Bentley's situation in the spring of 1950. Despite her public charges, Remington had been cleared by the Loyalty Review Board, and was holding an important position in the Department of Commerce. A libel suit based upon Bentley's charges against Remington had been settled by her co-defendants through the payment to Remington of a substantial sum of money. Not only this, but none of her many government contacts against whom she had made charges in her public appearances before the House and Senate Committees had been indicted at that time, or, for that matter, have ever been indicted (R. 1421-3).

These three circumstances combined to place her very means of livelihood in jeopardy. How could she continue lecturing or publish a book about experiences that had been successfully challenged by Remington, and about which the government had done nothing, unless something were done to prove Remington a liar?

In April and May of 1950, the House Committee on Un-American Activities reopened the Remington case. Bentley testified again (R. 1171) and in addition some witnesses testified to defendant's alleged membership in the Communist Party in Knoxville, Tennessee in 1936-7 between his sophomore and junior years in college (R. 595, 706). This of course had nothing to do with Miss Bentley's

charges of spying in Washington in 1942-3, five years later, but at most was evidence that defendant had, at some other time, been a Communist. Defendant was also examined by the House Committee in May (R. 2623), and was called before a grand jury in Washington around the same time (R. 2623). Again no indictment was returned.

This is the background upon which a grand jury in New York investigating espionage took up the Remington case later in May, 1950 (R. 2623).

E. The grand jury foreman's interest in Bentley and her book.

During the course of the trial, defendant's counsel received a call from a Mr. Brown who stated that a friend of his had information of importance to the defense (R. 1609). Brown had first offered his information to Judge Noonan, and was referred by the Judge to counsel (R. 1627-8). A week after the call, Brown brought his friend, a Mrs. Collins, to defense counsel (R. 1609). Collins had until shortly before the trial been in charge of publicity at Devin-Adair, the publishers of Bentley's book (R. 1598). Mrs. Collins was deeply troubled because she knew that during the time that Remington was appearing before the grand jury and at the time of the indictment, Mr. John Brunini, the foreman of the indicting grand jury, was collaborating with Bentley in the preparation of her book (R. 1598-1607).

This was the first information that the defense received about collaboration between the foreman of the grand jury and the chief prosecution witness (R. 1513, 1609) and this information became available to the defense just before Miss Bentley took the stand (R. 1607-09, 1627-29). Defense counsel pressed Bentley about her relations with Brunini. Bentley at first denied that Brunini did any writing on her book (R. 1377), but later conceded that he went over it "the same as any editor would" (R. 1377-79). Although Bentley admitted that Brunini had given her both "morale" and "editorial" support (R. 1377-78), she denied that he had any financial interest in her book (R. 1377, 1380). Bentley was evasive not only about her relations with Brunini, but even more

so about the book itself. She did not know when the book was to be published (R. 1381), although she talked about a "deadline" (R. 1419). She did not know where the book was since it was all in "bits and pieces" (R. 1417-9), although she several times referred to her "manuscript" (R. 1376, 1385). She would not even give the location of the book (R. 1417-21), although it was serialized shortly after the trial and has now been published in book form. She asserted that she never discussed with her publishers what the effect would be on her book if Remington was acquitted (R. 1381), although she conceded that she called Remington a Communist in the book (R. 1382).

During the course of Bentley's cross-examination, the defense produced and Bentley identified a contract between herself and Devin-Adair dated June 2, 1950 (6 days before the indictment). This contract, which was introduced in evidence by the defense (Ex. W, R. 1380), was witnessed by one Leyla Sefa (R. 1536). The defense called to the stand both Miss Sefa and Mrs. Collins. Neither Sefa nor Collins had ever met the defendant or had any interest in his acquittal (R. 1550, 1576, 1606). Indeed, the defense did not even see Sefa until the day before she appeared as a witness (R. 1563) and Collins until a few days before she appeared (R. 1609, 1627-9).

Mrs. Collins, who was publicity director for Devin-Adair until shortly before the trial (R. 1598), testified that she first saw Bentley when Bentley came to Devin-Adair with Brunini around the middle or end of May, 1950 (R. 1599). At that time the president of Devin-Adair, Mr. Devin Garrity, introduced Bentley and Brunini to Collins as follows: "This is Elizabeth Bentley who is going to do a book for us and this is John Brunini who is helping her do it • • •" (R. 1599).

Miss Sefa had been assistant to Garrity from October, 1949 to September, 1950 (R. 1535-6). Both Sefa and Collins identified the contract (Ex. W) dated June 2, 1950 between Bentley and Devin-Adair for the publication of Bentley's book (R. Sefa, 1536; Collins, 1601). Both witnesses testified that there was an earlier agreement prior to the one of June 2nd, under which Brunini was to be

Bentley's literary assistant and receive a part of the proceeds of the book (R. Sefa, 1537-1546, 1579-82; Collins, 1600, 1610, 1611). Sefa remembered typing a contract that embodied this agreement (R. 1545-6). Collins did not see the contract but, in response to a question by the United States Attorney, she testified that Garrity and Bentley stated that it had been signed (R. 1610-11).

Sefa, in response to a question by the United States Attorney, stated that Mr. Sloane, Editor of Devin-Adair, had told both her and Collins that the first contract was destroyed (R. 1594-5). Collins related that she had asked Bentley "Why was it necessary for us to destroy that contract, draw up another" and that Bentley replied "There is really no reason why we did it. We just thought it would be the best all around; there was no reason why we had to do it" (R. 1601-3). Sefa also testified that prior to the execution of the second contract dated June 2nd it was agreed that Brunini would receive compensation for his work on the book notwithstanding that this second contract did not mention him (R. 1546-50).

The testimony of the disinterested witnesses Collins and Sefa that Brunini and Bentley were collaborating on Bentley's book prior to the time of the indictment was not contradicted by any witness. The only part of the testimony of these two witnesses that was contradicted—and this only by Bentley—was the existence of the earlier contract under which Brunini had a financial interest in Bentley's book and the testimony that his financial interest survived the destruction of the earlier contract (R. 1380, 1386-8).

During the argument on the motion to dismiss the indictment, the United States Attorney announced that the "files of the government contain a full narrative of these incidents" (R. 1526-7). The United States Attorney further stated that he had discussed these matters with the Attorney General of the United States and with some Judges of the District Court, apparently with a view to quashing the indictment (R. 1527). Despite the fact that the matter was sufficiently serious to take up with the highest law officer of the United States Government, the

United States Attorney failed to make the information available to the defendant. The defense not only asked to inspect this narrative statement of the Brunini incident (R. 1637, 3132-4), but also, after the denial of its request, asked the trial court to seal the statement for the consideration of the appellate courts (R. 3126). In view of the unequivocal testimony of the two disinterested witnesses, Sefa and Collins, and the failure of the United States Attorney to call either Brunini or any of the officials of the publishing house, the refusal of the trial court to seal into the record the Brunini statement for the perusal of the appellate courts requires the acceptance of the testimony of Collins and Sefa on appeal.

In the light of the government's admitted knowledge of Brunini's connection with Bentley and her book, and its failure to give the defense any knowledge of this whatever, the conduct of the United States Attorney in cross-examining the two wholly disinterested witnesses who were called by the defense in an effort to establish these facts assumes a disturbing significance. The limitations of this petition prevent our discussing these incidents in detail. We can only ask the Court to read the typewritten record of that cross-examination, particularly the incident where Mrs. Collins was reduced to tears by the insistence upon a yes or no answer to what we can only describe as a trick question (R. 1615-37), and also to read the record of the proceedings on the next court day when the United States Attorney shouted to the jury that Collins and Sefa were "liars" (R. 1631).

In view of the fact that the true facts were known to the United States Attorney, this attempt to create the impression that the entire story was a fabrication was perfectly outrageous. If there was any part of the testimony of the witnesses Sefa or Collins that was not precisely in accordance with the "full narrative" in the possession of the government, it was the duty of the United States Attorney to state the true facts (*Griffin* v. *United States*, 183 F. 2d 990, 992-3 (App. D.C. 1950)) instead of adding to the impropriety of his original failure to inform the defense of all these facts before the trial by

this attempt to prevent the defense from proving any part of the facts at the trial.*

F. What happened in the grand jury room.

Before we discuss the legal effect of the aforementioned facts, we desire to point out certain other facts that strengthen the *prima facie* case already made for a dismissal of the indictment. Some of these facts are undisputed in the record. Others of necessity are only indicated by offers of proof. There may be still other facts unknown to the defense, for the defense is disadvantaged in presenting to this Court the story of what happened in the grand jury room owing to the fact that the defendant was denied an inspection of the minutes by the trial judge. The defendant, promptly after the Brunini incident came out in the record, moved to inspect all of the minutes of the grand jury on this ground, among others (R. 1527). Despite the overwhelming case that was made out for the inspection and despite the fact that the Government had rested, so that defendant could not be accused of seeking to discover the prosecution's case, the motion was denied (R. 1527-31). The defense then moved to inspect the minutes of defendant's testimony (R. 1531). This also was denied. Defendant's motion to have the minutes sealed and made a part of the record was reluctantly granted (R. 3126-32) and the minutes are thus available to this Court. (The Court of Appeals has now held that the defendant

* In view of the United States Attorney's failure to carry out his duty of informing defendant of these incidents, and indeed, on the contrary seeking to suppress these incidents, it was a little surprising to find the government raising, in the trial court and the court below, the question of the timeliness of the defendant's motions to dismiss the indictment. Having failed in its duty to disclose to the defendant facts which it had in its possession, the government cannot now take advantage of its own dereliction of duty to charge the defendant with failure to make its motions to dismiss at an earlier date. Whatever might have been the situation if the facts had been withheld from the defense by some subordinate official of the government, the withholding by the Attorney General of the United States and the United States Attorney is binding on the government. It was no doubt for this reason that neither the court below nor the trial court indicated that the motions came too late; apparently both courts were satisfied that there had been "cause shown" by defendant within Rule 12(b)(2).

should be permitted to see his own testimony in the event of another trial although for a different reason.)

The following additional facts are in the record:

The prosecution's case was presented to the grand jury by Mr. Thomas E. Donegan, a Special Assistant to the Attorney General (R. 1515-16, 1522-24). During the course of Bentley's cross-examination at the trial, she admitted, after first naming someone else, that Mr. Donegan had been her personal attorney in 1947 when he was engaged in the private practice of law (R. 1389-90) and had assisted her in recovering $7,200 from the cover job (R. 1388) that she had while she was a spy (R. 1280-5).

One of the first witnesses called before the grand jury was Mr. Joseph A. Egan, one of Miss Bentley's present personal counsel (R. 1391, 1496). Quite obviously, Egan could have had no personal knowledge of facts concerning Remington's alleged espionage or his alleged membership in the Communist Party; Egan was Bentley's personal counsel during the libel suit, after the association between Bentley and Remington had long since terminated; he had assisted in the preparation of her defense to that suit—*i.e.*, in seeking to prove that the defendant had been a member of the Communist Party (R. 1391). Consequently, Egan's testimony could only have been both incompetent and prejudicial. Defendant's motion to inspect the minutes of Egan's testimony (R. 1533) in an effort to prove these facts was denied (R. 3126).

Remington himself was subpoenaed before the grand jury, and kept there for five days (R. 2664). In support of defendant's motion to dismiss the indictment on the ground of the aforementioned facts (R. 1513), the defendant presented an affidavit setting forth alleged abusive and improper tactics by Messrs. Brunini and Donegan in the grand jury room (R. 1515). The affidavit set forth a number of subjects on which Brunini and Donegan had interrogated Remington which were wholly unrelated either to espionage or Communist Party membership, but were directly related to the public dispute between Bentley and Remington. Examples of such ir-

relevant subjects were what Remington's investigators during the libel suit uncovered about Bentley. Who was financing Remington's defense? Whether he knew certain reporters who had written favorable stories about the defendant and unfavorable stories about Bentley? Why hadn't he resigned from the Government? (R. 1515-16). What had these subjects to do with espionage—the only matter which the special grand jury was impanelled to investigate? Obviously, their only purpose was to aid in the campaign to rehabilitate Bentley.

Finally, when he was indicted, it was not for espionage, nor for any crime committed before he was called before the grand jury. During the course of his five days of cross-examination "in camera", he was asked the crucial question upon the answer to which the rehabilitation of Bentley's credibility, the consequent success of the book on which she and Brunini were collaborating, and the successful conclusion of the efforts of Bentley's lawyer, the witness Egan, in preparing the defense of the libel suit on her behalf, depended, and as to which, no doubt, her former private attorney and the present prosecutor, Donegan, was not unsympathetic: "At any time, have you ever been a member of the Communist Party?" He was indicted for perjury for swearing that he had not.

When the defendant took the stand in his own defense, his counsel sought to bring out the prejudicial action of the foreman during the questioning of the defendant before the grand jury. Having been denied the grand jury minutes, this was the only avenue of proof open to the defense. The United States Attorney vigorously objected and the judge sustained his protest (R. 2664). The United States Attorney's objection to the defendant testifying about the foreman's role at the grand jury being sustained, the defense made an offer of proof "to show the extent to which the foreman participated in the questioning and to show the abuse of the defendant before the grand jury by the foreman, all of which could not but have influenced the vote of the grand jury" (R. 2665).

G. The question before this Court.

This Court is thus faced with the question whether the transformation of a federal grand jury into a vehicle of private prosecution with the knowledge of the government warrants the dismissal of an indictment voted by that grand jury. A motion to dismiss the indictment on the ground of these gross improprieties was made at the close of the government's case (R. 1513), after Bentley had admitted that Brunini had collaborated with her in the preparation of her book (R. 1377-1378). It was repeated after the testimony of Collins and Sefa (R. 1624) and again at the close of the trial (R. 3723). The question was squarely presented to the court below and is squarely presented to this Court.

H. Under the decisions of this Court, the indictment must be dismissed because the gross improprieties in the grand jury room undermine the integrity of the judicial process and violate the constitutional guarantee of the Fifth Amendment.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *" Constitution, Amendment V. The purpose of this amendment was to insure that "no one shall be subjected to the burden and expense of a trial unless there has been a prior inquiry and adjudication by a responsible tribunal that there is probable cause to believe him guilty." *Beavers* v. *Henkel,* 194 U. S. 73, 84 (1903). Here the personal interest of Brunini, together with the relation of the prosecutor and of the witness Egan to Miss Bentley, prevented the indicting grand jury from performing its functions as an impartial or responsible tribunal.

One principle that stands out in the history of the grand jury as an institution is that it may not be used as the vehicle for partisan passion or private enmity. This Court, in *Ex Parte Bain,* 121 U. S. 1, 11 (1887), quoted Mr. Justice Field's historic charge to the grand jury that the grand jury:

> "is designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting a citizen against un-

> founded accusation whether it comes from government, or be prompted by partisan passion or private enmity."

The Federal courts have been vigilant in carrying out Mr. Justice Field's admonition and in preventing the grand jury from becoming a vehicle for the exploitation of private disputes. *United States* v. *Farrington,* 5 Fed. 343 (N.D. N.Y. 1881); *United States* v. *Kilpatrick,* 16 Fed. 765, 771 (W.D. N.C. 1883); *United States* v. *Wells,* 163 Fed. 313, 324-5 (D. Idaho 1908); *United States* v. *Rubin,* 218 Fed. 245, 248-9 (D. Conn. 1914).

It is important to remember that the grand jury is an arm of the court and that the transformation of the grand jury into a vehicle of private enmity is an assault upon the integrity of the judicial process. In *United States* v. *Coolidge,* 25 Fed. Cas. 622, 623, No. 14,858 (C.C.D. Mass. 1815), Mr. Justice Story states that:

> "The grand jury is the great inquest between the government and the citizen. It is of the highest importance, that this institution be preserved in its purity, and that no citizen be tried, until he has been regularly accused by the proper tribunal. Every indictment is subject to the control of the court * * *"

Here, indeed, we have the case of Mr. Justice Field's "private prosecutor" intruding into the grand jury room: a professed but unpunished criminal and her collaborator, the foreman of the grand jury, together with her past and present personal counsel, work in the jury room to bring about the indictment for perjury of the person who dared to call her a liar. What more flagrant example could be imagined of the improper intrusion of the private prosecutor into the deliberations of the grand jury?

The calling of Miss Bentley's personal counsel, Joseph A. Egan, before the grand jury, when he could have had no personal knowledge about defendant or his alleged Communist activities, would alone warrant the dismissal of the indictment upon the basis of the decided federal cases. *United States* v. *Rubin,* 218 Fed. 245 (D. Conn. 1914). Thus in *United States* v. *Farrington,* 5 Fed. 343 (N.D.N.Y. 1881), an attorney, who had previously insti-

tuted proceedings against two of the three defendants indicted, testified before the grand jury about facts of which he had no personal knowledge. The Court held that this was sufficient to justify a dismissal of the indictment. The Court said:

> "• • • It is patent that the grand jury permitted themselves to be influenced by the appeals and arguments of a zealous advocate, by hearsay testimony, and by testimony which the law prohibits, although they were advised to the contrary by the district attorney; and it seems much more probable that they were led to their conclusions by prejudice and undue zeal than by calm and fair deliberation. If there was evidence which authorized an indictment, it was so blended with and obscured by the mass of hearsay and otherwise incompetent testimony that it was impossible for the jury to distinguish it; and it would be expecting too much of a body, untrained in judicial investigation, to believe that they could discriminate intelligently between the competent and the incompetent evidence, so as to accord due weight to the former and be uninfluenced by the latter." Id. at 347.

We have been denied any opportunity to determine what Egan told the grand jury. But as his only connection with the defendant had been to try and prove he had been a Communist for the benefit of his client Bentley, we can only assume his testimony must have been improper.

Here the essential elements of lawful grand jury proceedings were violated. The foreman of the grand jury was not independent and disinterested. No one knowing the facts should have permitted Brunini to preside over the grand jury and to take the active part that he did in these proceedings. Indeed, the ancient oath of a grand juror "to present no one from envy, hatred or malice" (Charge to Grand Jury, 30 Fed. Cas. 992, 993) becomes a hollow mockery in the mouth of such a foreman. If in the selection of grand jurors one must not discriminate against race or religion or sex, which are mere indicia of bias, *Akins* v. *Texas,* 325 U. S. 398, 403 (1945); *Cassell* v. *Texas,* 339 U. S. 282, 283 (1950); *Ballard* v. *United States,* 329 U. S. 187 (1946), one must not permit a juror

inflamed by collaboration with the chief prosecution witness to preside as foreman.*

I. The reasoning of the court below conflicts with the decisions of this Court.

The constitutional protection against "the burden and expense of a trial" without prior "adjudication by a responsible" grand jury (*Beavers* v. *Henkel*, 194 U. S. 73, 84 (1903)), has always been zealously enforced by this Court. For example, this Court has repeatedly made clear that the action of a grand jury is void where there has been discrimination in its selection and without regard to any question of the influence or prejudice which this discrimination had upon the action of the grand jury (*Akins* v. *Texas*, 325 U. S. 398, 403 (1945); *Cassell* v. *Texas*, 339 U. S. 282, 283 (1950); *Ballard* v. *United States*, 329 U. S. 187, 195 (1946)). As this Court stated in the *Ballard* case, "reversible error does not depend on a showing of prejudice in an individual case. * * * The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." See also *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 225 (1946).

But the Court of Appeals, although it took cognizance of the facts related above, held that "the indictment should not be quashed unless undue influence is shown."** (Appendix B, xiii.) We respectfully submit that this holding is in

* It should be noted here that the present indictment was not for a crime committed elsewhere which was being investigated by the grand jury; it was for a crime committed in the grand jury room in answering a question presumably put to defendant by the prosecuting attorney or the foreman. In view of the interest that the foreman of the grand jury and the prosecuting attorney had in the chief prosecution witness, the case takes on strong elements of entrapment. *Sorrells* v. *United States*, 287 U. S. 435 (1932).

** In so holding, the court below seemed to rely on Rule 6(b) (2) which provides that "an indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment." But the court's

direct conflict with the rule laid down by this Court in the foregoing cases. Moreover, the Court of Appeals not only held the undue influence must be shown, but it held that, even though there might have been undue influence, the indictment should not be quashed unless the defendant is able, without the aid of the court or an inspection of the grand jury minutes, to prove undue influence. Thus the Court, after pointing out that the defendant might be able to show undue influence from the minutes of his own examination before the grand jury, an inspection of which had been allowed for other reasons, continued:

> "It is true that Brunini's alleged abuse of powers may have occurred while the defendant was not on the stand, and that without examination of the rest of the grand jury minutes the defendant may not find it possible to show undue influence. But we are unwilling to turn the indictment procedure into a separate trial. *Although it is possible that some abuses may thus go uncorrected,* it has been the policy of the law, and we think a sound one, to correct only such irregularities as the accused can prove, since an indictment is, after all, no more than an accusation." (Italics ours.) (Appendix B, xiii-iv)

Surely, if it is necessary to show "prejudice" in such a case as this, the defendant must at least be permitted to examine the grand jury minutes on such a showing as here presented. Otherwise, he would seem to be limited to calling members of the grand jury and asking them to publicly confess that their deliberations were improperly influenced.

The fallacious reasoning of the court below is further illustrated by the statement that an indictment is "no more than an accusation." What the court below overlooked is that it is an accusation, which, under the express provisions of the Constitution of the United States, must be made by a responsible tribunal. It is the likelihood of prejudice from the irresponsible nature of the grand

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reliance is misplaced. We are not here objecting on the ground that the foreman of the grand jury "was not legally qualified." We are objecting on the ground that he had a personal and private interest in procuring the indictment of this defendant for denying that he had ever been a member of the Communist Party.

jury rather than any actual prejudice which is determinative. *Tumey* v. *Ohio,* 273 U. S. 510, 522-23, 535 (1927); *Glasser* v. *U. S.,* 315 U. S. 60, 75-76 (1942).

J. This Court should grant review now.

It may be argued by the government, which has sought from the first to suppress this issue, that the question of the grand jury proceedings can be raised after another trial. But this is no ground for this Court withholding review at this time. This record squarely presents a question involving the integrity of the judicial process in the federal courts. This issue will never be more ripe for adjudication than it is today no matter how many retrials the government undertakes.

Remington has been under investigation by various agencies of the United States Government for six years. He has been called before three grand juries, two loyalty boards, two congressional committees, and one petit jury. Remington has already been "subjected to the burden and expense" of one trial lasting over six weeks and requiring an investigation of every phase and activity of ten years of his life on the basis of an indictment which should never have been returned. That trial exhausted his resources and those of his family so that at the present time he is heavily in debt and without funds to print the record in this Court or to defend against another prosecution undertaken with the unlimited resources of the government. Surely, he should not be subjected to a second trial on an invalid indictment. Surely, too, this Court should not delay in exercising its duty of "judicial supervision of the administration of criminal justice in the federal courts" (*McNabb* v. *United States,* 318 U. S. 332, 340 (1943)) and in vindicating the constitutionally-protected grand jury system which has been brought into disrepute by the events reflected in this record.

DARK PAGE BLEEDTHRU

II

The decision of the Court of Appeals sustaining the validity of the indictment conflicts with the applicable decisions of this Court and of other circuits, and presents an important question of federal law which should be settled by this Court.

The indictment alleges that the defendant committed perjury when he testified as follows:

> "Q. At any time, have you ever been a member of the Communist Party? A. I have never been."

The indictment further alleges that the question was material and that the "testimony of the defendant, as he then and there well knew and believed, was untrue in that the defendant had been a member of the Communist Party". There is no allegation as to when or where the defendant is alleged to have been a member of the Communist Party, or as to what facts are alleged to constitute the legal status of membership.

In an indictment for perjury at common law, it was necessary to set forth the truth of the alleged false statement. *Bartlett* v. *United States,* 106 Fed. 884 (9th Cir. 1901). Although in recent years the Court of Appeals for the Second Circuit has increasingly tended to uphold perjury indictments which did not contain such detailed specifications, the basic rationale of such cases in the past has been that such details are unnecessary, and therefore surplusage, where "the allegation of falsity is in effect an allegation which shows with certainty what the government claims the truth to have been". *United States* v. *Otto,* 54 F. 2d 277, 278 (2nd Cir. 1931).

We submit that it is apparent that in the present case "the allegation of falsity" is *not* "in effect an allegation which shows with certainty what the government claims the truth to have been". For the Court of Appeals itself in the course of its opinion pointed out that this defendant "never learned until the filing of the government's brief on appeal what acts the prosecution would contend showed that he believed himself to have been a member

of the Party"; and again, "As the case was tried, the defendant did not know even at the end of the government's case what he had to meet". (Appendix B, ix, x.)

At the opening of the trial the defendant moved to dismiss the indictment on the ground that it neither informed the defendant of what he had to meet, nor the Court of what the government had to prove. This motion was denied and the denial was upheld by the Court of Appeals, which said:

> "* * * perjury consists in testifying to the truth of a fact which the accused does not believe to be true; * * *. In the case at bar the indictment charged that Remington did not believe his denial of membership in the Communist Party, since it alleged that he 'well knew and believed' that his testimony was untrue." (Appendix B, v.)

We submit that an indictment is not valid simply because it alleges a crime in terms of the statute. The Sixth Amendment to the Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation * * *."

Rule 7(c) of the Federal Rules of Criminal Procedure implements the Sixth Amendment, providing:

> "The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged * * *."

This Court said in *United States* v. *Cruikshank*, 92 U. S. 542 (1875), at pp. 558-9:

> "It is a crime to steal goods and chattels; but an indictment would be bad that did not specify with some degree of certainty the articles stolen. This, because the accused must be advised of the essential particulars of the charge against him, and the court must be able to decide whether the property taken was such as was the subject of larceny. * * * Therefore, the indictment should state the particulars, to inform the court as well as the accused. It must be made to appear—that is to say, appear from the indictment, without going further —that the acts charged will, if proved, support a conviction for the offense alleged."

We respectfully submit that an indictment under which the defendant does not learn until after the trial is over what he has to meet fails to comply with that test.

The Court below suggested that to avoid this unfairness at another trial "the prosecution should be compelled to declare in a bill of particulars those 'overt acts' which it will prove as required in perjury and from which it will argue that the accused believed he had been a member of the Communist Party" (Appendix B, x).

The Court thus suggests that an indictment which concededly does not inform the accused of the very acts which form the *corpus delicti* of his crime could be cured by a bill of particulars. Yet this Court has ruled that a bill of particulars is not to be considered in determining the validity of an indictment. *Dunlop* v. *United States,* 165 U. S. 486 (1897), and see *United States* v. *Comyns,* 248 U. S. 349 (1919). And it is the widely recognized rule that a bill of particulars cannot cure a bad indictment. *Collins* v. *United States,* 253 Fed. 609 (9th Cir. 1919). As the Circuit Court for the Eighth Circuit said in *Jarl* v. *United States,* 19 F. 2d 891, 894 (1927):

> "• • • we do not know on what reason, or by what authority a District Attorney can assume to specify [in a bill of particulars] the particular offense the grand jury intends to charge, nor do we believe any statement he might make in that respect would be binding as of record on a plea of former jeopardy. He has no power of control or right to change the action of that body. There are cases in which that practice is appropriate, but the indictment must be good on its face; and that procedure cannot be resorted to, with or without the request of defendant, to amend an indictment which is bad because of a lack of precision, certainty and accuracy in charging the offense."

We respectfully submit that it is thus apparent that the decision of the Court below is in conflict with the decisions of this Court and of other Circuits. We submit further that this is not a mere matter of form. Had the indictment specified the "overt acts" upon which the government relied as proof that the defendant had been a member of

the Communist Party, as we believe it should have done and as the Circuit Court of Appeals (with some modification discussed in the next Point) now directs should be furnished in a bill of particulars before another trial can be had, we suggest that it might have been impossible to obtain a valid indictment. If the recital of these "overt acts" had gone beyond the available evidence, it is quite probable that the grand jury would not have returned an indictment. On the other hand, as we shall see in the next Point, if the recital had been limited to the available evidence of overt acts as disclosed by this record, the indictment would have been demurrable for failure to state an offense.

We submit that this issue presents an important question of federal law which should be decided by this Court. We cannot believe that an indictment which concededly does not inform the defendant of what he had to meet can be valid.

III

The decision of the Court of Appeals sustaining the denial of defendant's motion for a judgment of acquittal and holding that it was not necessary for the government to prove that the defendant had in fact been a member of the Communist Party conflicts with applicable decisions of this Court and of the other circuits, presents an issue fundamental to the further prosecution of this case, and raises important questions of federal law which should be settled by this Court at this time both in the public interest and in the interests of justice.

In the Court below, both the government and the defendant assumed that in order to sustain a conviction for perjury it was necessary for the government to prove, by direct evidence duly corroborated, both that the alleged perjurious statement was false in fact and that the defendant knew it to have been false. This has been the universal rule applicable to perjury cases both in this

country and in England, so far as we are aware, and this Court in *American Communications Assn.* v. *Douds,* 339 U. S. 382, 410, 411 (1949), recently indicated how the rule should be applied in proving the falsity of a denial of membership in the Communist Party:

> "In proving that one swore falsely that he is not a Communist, the act of joining the Party is crucial."

Accordingly, the defendant contended in the courts below that his motion for a judgment of acquittal should have been sustained by the trial court and that such a judgment of acquittal should now be ordered, not only because there was no evidence of an "act of joining", but also because there was no direct evidence of any kind in the record and the government's own evidence affirmatively established that the defendant never had joined the Party.

In answer to these contentions, the government conceded in its brief below that it had no evidence that the defendant had joined the Party, but contended that certain evidence in the record relating to the alleged payment of Communist Party dues and the defendant's use of an alleged Party post office box was no less "direct" than an act of joining (Government's brief below, pp. 19-20).

We replied that this concession required a judgment of acquittal, because it was apparent that as a matter of law neither of these items constituted direct evidence of membership and that in any event, the evidence relied on by the government not only failed to establish either that the payments were "dues" or that the box had been a Party box when the defendant had access to it, but, on the contrary, affirmatively established that the defendant never had joined the Party.

But the Court below held that it was not necessary for the government to prove that the defendant had in fact been a member of the Communist Party, either by direct evidence or otherwise, and sustained the trial court's denial of defendant's motion for a judgment of acquittal without passing on the question of whether there was any direct evidence, and indeed, without any discussion of the

evidence whatever. We believe that this decision is in conflict with existing Federal law both in this Court and in other Circuits (a) as to the principle of law announced by the Court, and (b) in its application to this case.

A. The decision of the Court of Appeals that in a perjury case it is not necessary for the government to prove that the defendant had in fact testified falsely, but only to produce direct evidence of "overt acts" from which the jury might "infer" the defendant's "belief" that he had testified falsely, conflicts with applicable decisions of this Court and of the other circuits and raises an important question of Federal law which should be settled by this Court.

Although the Court of Appeals reaffirmed the rule that in order to sustain a conviction in a perjury case there must be "'direct' proof of the crime by two witnesses who testify that the accused violated his oath, or 'direct' proof by one witness plus corroborating circumstances" (Appendix B, viii), the Court held that the "crime" did not consist in swearing to a statement that was false in fact, but only in swearing to a statement which the defendant did not "believe" to be true. Thus in upholding the validity of the indictment, the Court held that "perjury consists in testifying to the truth of a fact which the accused does not believe to be true" and continued: "The further allegation [in the indictment] that he had in fact been a member of the Party was surplusage, but proof of the fact of membership might be relevant on the issue of his belief that he had been a member" (Appendix B, vi). In further amplifying this new doctrine the Court later defined it as follows:

> "Hence the doctrine that perjury must be proved by the direct testimony of two witnesses or one corroborated witness means that the witnesses must testify to some 'overt act' from which the jury may 'infer' the accused's actual belief". (Appendix B, viii).

The sole Federal authority cited by the Court in support of this proposition is the language of Title 18 U.S.C.A. §1621, which reads as follows:

> "Whoever, having taken an oath before a competent tribunal, * * * that he will testify, declare, depose, or certify truly, * * * wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, * * *"

Literally applied, this would seem to support the position taken by the Court, but, as this Court held in *United States* v. *Norris,* 300 U. S. 564, 574 (1937), that statute, which was first enacted in substantially its present form in 1873 as Revised Statutes §5392, subsequently became Criminal Code §125, and is now 18 U.S.C. 1621, was intended to give effect to the then existing common law.

We know of no case in any Federal Court either before or since the enactment of that statute which even suggests that it is not necessary to prove actual as well as wilful falsity under a perjury indictment. Indeed, the very cases cited by the Court below in support of the rule requiring direct evidence show that it is the falsity of the defendant's statement, rather than his "belief" in its falsity, that must be established in accordance with that rule.

For example, in *Clayton* v. *United States,* 284 Fed. 537 (4th Cir. 1922), the Court reversed a conviction for perjury in the prohibition era because there was no direct evidence that the defendant had *in fact* sold liquor, and in *Radomsky* v. *United States,* 180 F.2d 781 (9th Cir. 1950), the Court reversed because there was no direct evidence that the defendant had *in fact* not mailed a certain letter which she swore she had mailed. There is no suggestion in either case that the only issue is whether the defendant "believed" he had sold liquor or mailed the letter.

Even the cases cited by the Court below from its own prior decisions sustain this general principle:

In *United States* v. *Hiss,* 185 F.2d 822 (2nd Cir. 1950), cert. den. 340 U. S. 948, the questions at issue were whether the direct testimony of Chambers that Hiss had given him certain papers was sufficiently corroborated by proof that the papers had been written on Hiss' type-

writer, and whether Mrs. Chambers "independently" corroborated her husband's testimony as to meetings with Hiss. There is not a word either in the opinion or in the briefs regarding Hiss' "belief" as to the truth of these facts.

In *United States* v. *Otto,* 54 F.2d 277 (2nd Cir. 1931), the Court reversed a conviction because there was no direct evidence that the defendant had ever "talked to O'Connell about the Albany Baseball Pool." There was no suggestion that the only issue should be whether the defendant "believed" that he had never had such a conversation.

We do not mean to suggest that proof of "belief" in the sense of "wilfulness" was not also necessary in these cases. But we think it is apparent that in these, as indeed in nearly every perjury case, proof of actual falsity would also constitute proof of wilfulness. For example, proof that this defendant had in fact joined the Party would also constitute proof that he knew he had joined, unless the defendant were able to convince the jury he did not know that his proven acts constituted an "act of joining."

The same rule has been universally followed in this Court. In *Weiler* v. *United States,* 323 U. S. 606 (1945), where the issue was whether the defendant had bought or had in his possession on a certain date certain automobile tires, this Court, following its decision in *Hammer* v. *United States,* 271 U. S. 620 (1926), held that it was error for the trial court to refuse to charge the jury that "The Government must establish the *falsity of the statement* alleged to have been made by the defendant under oath, by the testimony of two independent witnesses or one witness and corroborating circumstances" (italics ours). There was no suggestion in that case that the jury could convict the defendant on the basis of "overt acts" from which they could "infer" that he "believed" that he had bought the tires or had them in his possession. And in the *Hammer* case, *supra,* this Court in holding that the rule regarding proof of perjury applied equally to prosecutions for subornation of perjury, said:

"Falsity is as essential in one as in the other. It is the *corpus delicti* in both."

To the same effect, see *United States* v. *Wood,* 14 Peters 430 (1840).

Nor do the miscellaneous non-federal cases and text-writers cited by the Court of Appeals in foot-note 4 of its opinion (Appendix B, v) sustain the proposition that it is not necessary in a perjury case to prove actual as well as wilful falsity. For example, in *Regina* v. *Schlesinger,* 2 Cox C. C. 200 (1847) the Queen's Bench sustained an indictment alleging that the defendant had falsely sworn that he thought that words were not his writing whereas in truth the said words were his writing and whereas in truth he thought that said words were his writing.

In *State* v. *Cruikshank,* 6 Blackf. (Ind.) 62 (1841) the Supreme Court of Indiana upheld an indictment alleging that the defendant had falsely testified that he believed the value of a certain cargo to be $9,000 "whereas in truth and in fact he did not" so believe, citing 3 Co. Inst. 166, as follows:

"* * * the plaintiff caused two men to swear the value of his goods that never saw them or knew them; and though that which they swore was true, yet because they knew it not, it was a false oath in them."

Similarly in *Commonwealth* v. *Miles,* 140 Ky. 577 (1910) and *State* v. *Gates,* 17 N. H. 373 (1845) convictions for perjury were sustained where it was proved that the defendant had testified that he knew a fact to be so, upon proof that he had no knowledge whatever concerning the fact sworn to.

We submit that these cases merely show that when a person asserts *as a fact* that he has certain knowledge or holds a certain belief, he may be convicted of perjury upon direct proof that, *in fact,* he did not hold such a belief or that he had no belief or knowledge. Certainly, they do not sustain the proposition that where a man is indicted for falsely stating a fact he can be convicted of perjury on the proof of "overt acts" from which a jury might "infer" that he did not believe his answer to be

true, without any proof that his statement was actually false.

We submit that a statute which for so many years and in so many cases has been consistently interpreted as requiring proof of actual as well as of wilful falsity cannot now be construed as requiring proof of "belief" alone. Nor do we believe, for reasons which will be apparent in a moment, that such an interpretation would be either wise or proper.

Having reached the conclusion that "the crime of perjury consists in the contradiction between the accused's oath and his belief", the Court below sought to apply it to the so-called "direct evidence rule." First, the Court pointed out that, in the absence of written or sworn contradictory statements, it was impossible to prove the defendant's "belief", *i.e.*, his "state of mind", by direct evidence. Accordingly, the Court concluded:

> "Hence it must be that the rule peculiar to perjury as to the character of the proof, means that it is the facts from which the jury may infer the accused's state of mind that must be proved by 'direct' evidence." (Appendix B, vii)

In support of this conclusion the Court cited that portion of the opinion of Chief Justice Vinson in *American Communications Association* v. *Douds*, 339 U. S. 382, 411 (1950), dealing with the method of proving "the state of a man's mind" in a prosecution for falsely denying a belief in the overthrow of the government by violence: After pointing out that "* * * while objective facts may be proved directly, the state of a man's mind must be inferred from the things he says or does" the Chief Justice concluded that "such manifestations" are "as much 'overt acts' as the act of joining the Communist Party".

We respectfully submit that the Court below has overlooked the portion of the Chief Justice's opinion immediately preceding the part from which the above quotations are taken, and which relate to the very question here in issue: proof of the falsity of a denial of membership in the Communist Party. When read as a whole, we sub-

mit that exactly the opposite conclusion from that drawn by the Circuit Court must be reached. The relevant portion of the opinion when read as a whole is as follows:

> "Insofar as a distinction between beliefs and political affiliations is based upon absence of any 'overt act' in the former case, it is relevant, if at all, in connection with problems of proof. *In proving that one swore falsely that he is not a Communist, the act of joining the Party is crucial.* Proof that one lied in swearing that he does not believe in overthrow of the Government by force, on the other hand, must consist in proof of his mental state. To that extent they differ.
>
> "To state the difference, however, is but to recognize that while objective facts may be proved directly, the state of a man's mind must be inferred from the things he says or does. Of course we agree that the courts cannot 'ascertain the thought that has had no outward manifestation.' * * * False swearing in signing the affidavit must, as in other cases where mental state is in issue, be proved by the outward manifestations of state of mind. In the absence of such manifestations, which are as much 'overt acts' as the act of joining the Communist Party, there can be no successful prosecution for false swearing." (Italics ours.)

Thus, this Court lays down in the clearest terms the distinction between proof of the falsity of a statement of "belief" and proof of the falsity of a statement of "fact"—and confirms our contention that the proper method of proving the "fact" of membership in the Communist Party is by proof of an act of joining.

It may be that under the authority of the cases discussed at page 36, *supra,* a defendant who swore that he did not believe in violent overthrow of the Government could be convicted of perjury upon direct proof, for example, that he had repeatedly advocated revolution. For that would be direct evidence of the *fact* that he held such a belief—unless the defendant could convince the jury that he hadn't meant what he had said. But that is a very different thing from saying that when a witness is asked to testify as to a fact or event, he could be convicted of perjury upon proof of an "overt act" from which the jury might "infer" that he did not "believe" his answer to be

true. For in effect, that is to say that every perjury case is not only a "state of mind" case, but a "circumstantial evidence" case. An "overt act" from which a jury may "infer" that a defendant didn't believe what he said, we submit, is no more than "circumstantial evidence" that he "believed" that he had lied.

Moreover, we submit that a moment's consideration of the practical application of this rule in the trial of a perjury case will show that it cannot and should not be the law. Thus the court below, after again repeating its conclusion that the so-called "direct evidence rule" in perjury cases "means that the witnesses must testify to some 'overt act' from which the jury may 'infer' the accused's actual belief," continued:

> "We do not see how the perjury rule can in practice be applied at all in such a case as the present unless the judge shall single out such 'overt acts' as furnish a rational basis for inferring what the accused thought constituted membership and which were supported as the rule requires, and shall then instruct the jury that unless they believe the testimony as to such facts—or at least one of them—and think that because of it, taken with any corroborating evidence, the accused must have believed he was a member, they cannot find him guilty." (Appendix B, viii)

We agree, of course, that it is necessary for the trial judge in a perjury case to single out the direct and corroborative evidence of guilt which must be believed by the jury in order to convict. But surely there is not much left of the perjury rule if all it means is that a person may be convicted on direct proof of circumstances from which the jury may infer his guilty intent.

Moreover, how is the trial court to determine what "overt acts" in the evidence "furnish a rational basis for inferring what the accused thought"? If we abandon all relation to the truth of the alleged false statement, *i.e.* the criteria for determining actual membership, what objective standards are to guide the trial court in determining what "overt acts" furnish such a rational basis, or an appellate court in reviewing such a determination? Could

the court charge the jury that they could "infer" from the testimony of two witnesses that the defendant had attended Communist Party meetings in Knoxville, that he "must have believed that he was a member", even though the witnesses admitted that they did not know of their own knowledge whether or not he had been a member? Or could a jury be permitted to "infer" from evidence, properly supported under the rule, that a defendant had opposed aid to Britain until the invasion of Russia, or had opposed military aid to Chiang Kai-Shek, (this defendant did neither) that he therefore "must have believed he was a member" of the Communist Party? Indeed, depending on the climate of public opinion, could not either of two witnesses who contradict each other under oath as to whether a certain State Department document does or does not prove that a certain individual had "considered" recognition of Communist China be convicted of perjury under this rule on proof of overt acts from which an inference could be drawn that he did not believe what he had said? And indeed, in such a case and under this rule we assume that it would be immaterial what the document in question said, or even that it might be equally susceptible of either interpretation.

We submit that as soon as we abandon the test of objective truth, we enter upon a realm of surmise and speculation which not only destroys all protection which the perjury rule is intended to afford to a defendant, but presents almost insurmountable difficulties in its application to the average perjury case.

As Mr. Justice Jackson pointed out in *Communications Association* v. *Douds,* 339 U. S. 382, at page 437:

> "• • • I know of no situation in which a citizen may incur civil or criminal liability or disability because a court infers an evil mental state where no act at all has occurred. • • •
>
> "It is true that in England of olden times men were tried for treason for mental indiscretions such as imagining the death of the king. But our Constitution was intended to end such prosecutions."

It seems to us that under the rule laid down by the Court below a man could be convicted of perjury upon proof of overt acts from which a jury might infer that he imagined that he had lied, even though he had not lied at all. We respectfully submit that this is not, and should not be, the law, and that the proper rule of perjury is that a man must be proved, by direct evidence corroborated, to have sworn not only wilfully, but falsely.

We respectfully submit that there is here presented a question of the utmost importance which should be decided by this Court at this time not only in the interests of justice to this defendant, but in the public interest. In the first place, there is a direct conflict between the decision of the Court below and those of this Court and other Circuit Courts. Secondly, it presents an issue "fundamental to the further conduct of the case." *United States* v. *General Motors Corp.* 323 U. S. 373, 377 (1945). If the Court of Appeals' rule is applied, we do not see how the case could be properly retried, or how the Court could properly charge the jury on a new trial. On the other hand, as we shall see in a moment, if the correct rule is applied to the undisputed evidence in this case, an order of acquittal must be entered, thus terminating this prosecution. Thirdly, it is a rule which we believe must be clarified in the interest of the general administration of justice. We need not point out the great importance at this particular time of establishing a correct, fair and workable rule for the prosecution for perjury in such cases as the present. Under the rule enunciated by the Court below it would seem very dangerous for anyone who for whatever motive has at any time favored, or even "considered", a policy which was also favored by the Communist Party or which some persons may think was helpful to the Communists, to deny under oath that he himself was a member of the Communist Party. Who knows whether under this rule and in this atmosphere evidence of such "overt acts" may not be relied on as a basis for inferring that he believed he had been a Communist? And who knows whether, at sometime in the reasonably foreseeable future, present support of Marshal Tito, or Franco, or of

our recent enemies, Germany and Japan, might not subject honest and patriotic citizens to indictments for perjury for a denial that they had been either Communists or Fascists, or whatever term may then be applied to those holding such views, on the ground that, in the light of the circumstances at that time existing, it can be made to appear that they could not have "believed" such support to have been truly in the interests of this country?

B. The decision of the Court below sustaining the trial court's denial of defendant's motion for a judgment of acquittal despite the government's concession that it had no evidence that the defendant had ever joined the Party, and the fact that as a matter of law the only evidence which the government even contended was "direct" evidence of membership was at most only circumstantial, conflicts with the decisions of this Court and of other circuits, and presents an important question of Federal law which in the public interest should be settled by this Court.

As we have indicated above, this case was presented to the Court below by both the government and the defendant on the assumption that it was necessary for the government to show that there was direct evidence in the record that the defendant had at some time in fact been a member of the Communist Party. We believe we have conclusively demonstrated in the previous Point that that is the correct rule. Moreover, as we have also pointed out, the government conceded in the Court below that it had no evidence whatever of an act of joining. We submit that it follows inevitably from an application of the correct rule to this case that the decision of the Court of Appeals sustaining the trial court's denial of defendant's motion for a judgment of acquittal was inconsistent with the decision of this Court in *American Communications Association* v. *Douds,* 339 U. S. 382, 410-11, and with the decisions of other Circuits requiring proof of falsity by direct evidence, and erroneous.

It seems to us, not only on the authority of the *Douds* case, *supra,* but as a matter of principle, that it must be the law that in order to prove membership in the Com-

munist Party in a perjury case there must be direct evidence of an act of joining. Such evidence is indubitably the best and most "direct" evidence of membership. On the one hand, unless the defendant had joined the Party he could not have been a member, however many witnesses may testify that, in their opinion, he acted like one. This is particularly well illustrated in the present case, where, as we shall see in a moment, the very witnesses upon whom the government relies in support of what it contends is direct evidence also establish that the defendant never had joined the Party. Under such circumstances we submit that no other evidence could either be "direct", or even of sufficient probative value to sustain a conviction.

On the other hand, proof of an act of joining is clearly the most unequivocal, and, we believe, the only truly "direct" evidence of membership. For example, direct evidence, duly corroborated, of such objective facts as that the defendant had applied for membership and been accepted, that he had paid his initiation fee, or that he had had a Party card, the issuance of which concludes the act of joining, would constitute direct evidence that he had been a member, just as evidence that the defendant in *Clayton* v. *United States,* 284 Fed. 537 (4th Cir. 1922), *supra,* had received money from X and handed him a bottle of whiskey, would be direct evidence that he had sold liquor. If such evidence is believed by the jury, there can be no possible doubt of the defendant's guilt, unless he proves that he didn't understand the nature of his acts.

Perhaps the best proof of the soundness of this view is to consider the argument which the government made below in an effort to show that there was other evidence in the record which was no less direct proof of membership than evidence of an act of joining. The government contended that proof of an act of joining would be "no more direct than" two items of evidence in the record, one relating to the alleged payment of Communist Party dues to Bentley in 1942 and 1943, and the other relating to his use of an alleged Party post office box in 1937. (Gov't Brief below, pp. 19-20)

We think it must be immediately apparent that as a matter of law neither of these items is more than circumstantial evidence of membership. "Circumstantial evidence is that which establishes the fact to be proved only through inference based on human experience that a certain circumstance is usually present when another certain circumstance or set of circumstances is present. Direct evidence establishes the fact to be proved without the necessity for such inference." (*Radomsky* v. *United States*, 180 F. 2d 781, 783 (9th Cir., 1950).) Obviously, it requires an inference from the fact that a person paid dues to the Communist Party or had access to a Communist Party post office box to the fact that he was a member, i.e. "He performed an obligation or exercised a privilege of membership: Therefore, he was a member." It might still be possible that he paid dues without having joined. Indeed, one government witness so testified (R. 279-83). On the other hand, it requires no inference from proof that he joined the Party to the fact that he was a member, for the act of joining itself creates the status of membership. It would not be possible to "join" without becoming a member.

Moreover, we submit that it is apparent from a consideration of the character of the evidence relied on by the government in support of this contention that under no circumstances could it be considered "direct". For it does not even establish either that the payments in question were "Communist Party dues" or that, at the time the defendant had access to the post office box in question, it was a Party box—although it does establish that the defendant never joined the Party.

On the question of dues, it is clear from the record in the case, and we think it is a matter of common knowledge to anyone who has made any study of Communist Party organization, as this Court has been required to do on several occasions, that dues are payable either every two weeks or at least once a month (Constitution Art. III, Sec. 2; By Laws: "Rate of Dues". Def's Ex. G), that payments are evidenced by the issuance of formalized

dues stamps bearing the Party insignia (R. 919, Def's Ex. B), which must be pasted in the member's card or dues book (R. 608, 919, 1178), and that the "book" itself must be turned in to Party headquarters every six months for the purpose of checking whether it contained the requisite number of dues stamps (R. 879, 881).

Even if it could be argued that direct evidence that a person paid dues regularly over a substantial period of time in accordance with these rules might constitute direct evidence of membership, on some such theory as that the purpose of the formalized stamps was to paste them in a "book" and that one could not have continued to be a member unless his book had been turned in and checked every six months, the evidence on which the government here relies not only shows that no payments whatever were made in compliance with these regulations, but that the defendant never did "join" and never had a "book."

The only evidence regarding dues relates to the period during which the defendant concededly had occasional meetings with Bentley, 1942 to 1944. Bentley says that during this period she received what she described as "Communist Party dues" from the defendant or his wife six or seven times in a period of more than two years (R. 1248-9), that she never gave the defendant or his wife any "dues stamps", although she did give them blank forms of receipts (R. 1240-1), and that she never saw the defendant's Party card or "book", but assumed that he had turned it in to Party headquarters (R. 3010). The only other government witness on this aspect of the case, the defendant's divorced former wife, testified that it was she, and not the defendant, who wanted to pay "dues" to Bentley (R. 389-90, 396); that she considered that the payments were Communist Party dues, although she is uncertain as to the amount or number of payments (R. 243, 396, 397, 404-6); that the receipts they got were not stamps but just a piece of white paper which she thought was "foolish" and "burned it up * * *. It did not seem necessary to get a receipt" (R. 397-9); that she and the defendant, although she claims they were both members

of the Party, never had any Party books or cards (R. 439-40), never filed an application for membership (R. 437), "were not orthodox Communists in the sense of following all the rules", "were Communists as much as we wanted to be Communists, and not subject to a hierarchy" (R. 441-2), did not join any unit because they "did not like the type person that was in these local units, petty bureaucrats, I would say" (R. 351), and finally, that for the three years preceding their introduction to Bentley they belonged to no branch (R. 351), attended no unit meetings (R. 437), and paid no dues, except "possibly something to Joe North, sort of unofficially" in that entire period (R. 309)—although she insists that if they did make such a payment to Joe North it "would have been dues" (R. 381). (Bentley thought they were already members at the time she met them (R. 3010)).

The characterization of these payments as "Communist Party dues" by Bentley and Mrs. Remington is, of course, no more than a conclusion, and does not make them so. The evidence is clear that many non-members paid money to the Communist Party (R. 1179a). Mrs. Remington herself admits she paid money which she called "dues" when she was not a member (R. 279-83). While it might be that proof *aliunde* that the Remingtons were members would prove that these payments were "dues", proof of the payments themselves certainly does not prove that they were members. We submit that it is perfectly apparent from the facts testified to by these government witnesses that the defendant never did pay "Communist Party dues", and moreover, that the defendant never joined the Communist Party and at most, even if these witnesses be given the fullest credence, was never anything more than a sympathizer or "fellow traveler". We submit that this is not "direct evidence of membership".

The evidence regarding the post-office box relates to the period prior to his marriage, when the defendant was working for the T.V.A. in Knoxville, Tennessee. This evidence is even less direct than the evidence regarding dues. Indeed, there is not even any competent evidence

that it was a Party box while the defendant was in Knoxville. The evidence is that the defendant had access to a certain post-office box in the Spring of 1937 (R. 2448) which the government witness Crouch, swore was the official Communist Party box for Knoxville, to which only Party members could have access. But at the time Remington was in Tennessee, Crouch was the Communist Party organizer stationed in South Carolina (R. 811). He did not become organizer for Tennessee until 1939, two years after the defendant had left Knoxville. However, Crouch says he knew it was a Communist Party box in 1937 because at some time during the spring or early summer of that year he sent Communist Party literature to it (R. 850). Obviously this is all the rankest hearsay, and not even competent circumstantial evidence that Remington was a member, much less "direct" evidence. In any event, Remington left Knoxville in the end of June, 1937 (R. 1887, 2194).

Moreover, the Party organizer, who was also secretary, for Knox County during the summer of 1937, one McConnell (R. 582-3), testified at length and in great detail for the government but was not asked about the box, although it is clear from Crouch's testimony that he would have had charge of it, if it had been the official Party box at that time. (The defense did not ask him about the box as Crouch had not yet testified). He also testified that although the defendant did a number of things which indicated that he was a member, nevertheless, although as organizer and secretary he had charge of the Party records (R. 677) he had never seen the defendant's book, collected dues from him, issued stamps or other necessary Party documents to him, or known him to be a member of the T.V.A. unit, to which, as a T.V.A. employee, he would have belonged if he had been a member (R. 676-7). When asked whether under these circumstances he could say that he knew of his own knowledge that Remington was a member, he replied "save by saying that my relations with Mr. Remington were those of fellow-Communists" (R. 684).

We submit that if the proper rule applicable to perjury cases is applied, it is apparent from the government's own evidence not only that the government failed to prove that the defendant was ever a member of the Communist Party, but that the defendant in fact never was a member. Indeed, we submit that, quite apart from any special rules applicable to perjury cases, and on simple principles of the "weight of the evidence", the government has failed to prove its case. Surely a man could not be proved to have been a member of a golf club by any amount of evidence that he used the club and paid greens fees, or that several former members thought he had been a member, in the face of testimony by the secretary of the club that, although he acted like a member, there was no evidence that he had joined, paid membership dues, or held a membership card, and by his wife, that although she considered them both members, they had not "joined" because they didn't like the other members. If he had been a member, these two witnesses were in the best position to have given direct testimony to that effect. Their failure to do so is the best proof that he was not.

We respectfully submit that in the light of this record the decision of the Court below sustaining the trial Court's denial of defendant's motion for a judgment of acquittal was in conflict with the decisions of this Court and of other Circuits referred to in the previous point, and was clearly erroneous. Moreover, we respectfully submit that this is a case in which this Court should now direct the entry of a judgment of acquittal.

We recognize that a new trial may be permitted in the Federal courts even though a judgment of acquittal should have been directed by the trial Court. But this, we believe, is generally permitted only when there was a failure in some aspect of the government's required proof which might, and from the record probably could, be readily cured on another trial. In this case we do not contend simply that the government has failed to prove its case. We think that the government's own witnesses have established the defendant's innocence. We do not see how the

government could prove in another trial that the defendant had at some time joined the Communist Party unless they were able somewhere to find another ex-Communist who would be willing to contradict the testimony given by their own witnesses on the first trial. Under such circumstances we can see no justification in permitting another trial. For the reasons set forth in Point I, *supra,* this defendant should not again be placed in jeopardy.

CONCLUSION

For the foregoing reasons, this petition for a writ of of certiorari should be granted

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

WILLIAM WALTER REMINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION TO DISPENSE WITH PRINTING OF RECORD ON PETITION FOR WRIT OF CERTIORARI

Petitioner, William Walter Remington, respectfully requests the Supreme Court of the United States to dispense with the printing of the record in connection with the consideration of the petition for certiorari and in support of said request sets forth the following:

(1) The record was not printed in the Court of Appeals, that Court having issued an order dispensing with the printing of the record and allowing review on the typewritten record.

(2) Petitioner's entire financial resources were utilized at the trial. He has no assets, real or personal, other than his personal effects; he has no regular income from any source whatever; he is heavily in debt. Consequently, he is unable to pay the cost of printing the record.

(3) The typewritten transcript of the proceedings of the trial and sentencing contains 4045 pages. Petitioner is unable to raise the money, through borrowing or from other sources, to provide for the printing of such a lengthy transcript.

WHEREFORE, for the reasons set forth above, it is respectfully requested that this Court grant petitioner's motion to dispense with the printing of the record in connection with the consideration of the petition for certiorari.

Respectfully submitted,

WILLIAM C. CHANLER
JOSEPH L. RAUH, JR.
Attorneys for Petitioner

DARK PAGE BLEED

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 293—October Term, 1950.

(Argued June 15, 1951 Decided August 22, 1951.)

Docket No. 22045

UNITED STATES OF AMERICA

Appellee,

—v.—

WILLIAM REMINGTON,

Appellant.

Before:

SWAN, *Chief Judge,* AUGUSTUS N. HAND and L. HAND, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York.

The defendant appeals from a judgment of conviction and sentence under an indictment charging him with perjury, 18 U. S. C. A. §1621, in testifying falsely before a grand jury. Judgment reversed and cause remanded.

WINTHROP, STIMSON, PUTNAM & ROBERTS, *Attorneys for appellant;* William C. Chanler, Joseph L. Rauh, Jr., and James S. Rosenman, of Counsel.

OTHRU

IRVING H. SAYPOL, United States Attorney, *for appellee;* Bruno Schachner, Roy M. Cohn, John M. Foley, Albert A. Blinder, Joseph N. Friedman, James B. Kilsheimer, III, Stanley D. Robinson and Robert Rubinger, Assistant United States Attorneys, of Counsel.

SWAN, *Chief Judge*:

After a protracted jury trial the appellant was found guilty of the crime of perjury in testifying before a grand jury that he had never been a member of the Communist Party.[1] The evidence submitted to the jury related to three periods, in each of which the prosecution specified in a bill of particulars that the appellant was a member of the Party. The first period covered the years 1936-7, when he was employed as a TVA messenger at Knoxville, Tennessee; the second covered the years 1937-40, during which he was a student at Dartmouth and Columbia; and the third covered the years 1940-44, when he was employed in Washington.[2] The jury's general verdict gives no intimation as to the period or periods in which they found him to have been a member of the Communist Party. The appeal challenges the validity of the indictment, the sufficiency of the evidence, the adequacy of the charge to the jury, and the correctness of numerous rulings of the court in the course of the trial. Our conclusion that the judgment must be reversed on account of the inadequacy of the charge

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1 18 U. S. C. A. §1621.

2 Evidence as to an earlier period, 1934-6, covering the appellant's freshman and sophomore years at Dartmouth, was withdrawn from the jury.

to the jury makes unnecessary discussion of many of appellant's contentions.

1. The Indictment: At the commencement of the trial the court denied a motion to dismiss the indictment for failure to state an offense. The indictment alleged that in May 1950 the defendant appeared as a witness before a grand jury for the southern district of New York, which was investigating possible violations of the espionage laws; that he was asked the question: "At any time have you ever been a member of the Communist Party?" and he answered under oath, "I have never been"; and that "the aforesaid testimony of the defendant, as he then and there well knew and believed, was untrue in that the defendant had been a member of the Communist Party." The statute defines the crime of perjury to be stating under oath "any material matter which he does not believe to be true."[3] Thus perjury consists in testifying to the truth of a fact which the accused does not believe to be true;[4] his oath must contradict his belief as to the fact sworn to, for otherwise his oath is not wilfully false. In the case at bar the indictment charged that Remington did not believe his denial of membership in the Communist Party, since it alleged that he "well knew and believed" that his testimony was untrue. The further allegation that he had in fact been a member of the Party was surplusage,[5] but proof

3 Tit. 18, U. S. C. A. §1621: "Whoever, having taken an oath before a competent tribunal, * * * that he will testify, declare, depose, or certify truly, * * * willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, * * *"

4 *Regina* v. *Schlesinger*, 2 Cox C. C. 200; *State* v. *Cruikshank*, 6 Blackf. (Ind.) 62; *Com.* v. *Milles*, [sic] 140 Ky. 577; *State* v. *Gates*, 17 N. H. 373; 1 Hawkins, Pleas, 1787 ed. c. 69, §6, p. 322; 2 Wharton, Criminal Law, 12th ed., §§1512-13.

5 *United States* v. *Hiss*, 2 Cir., 185 F. 2d 822, 831, cert. denied 340 U. S. 948; *Sharron* v. *United States*, 2 Cir., 11 F. 2d 689, 690.

of the fact of membership might be relevant on the issue of his belief that he had been a member. There was no error in denying the motion to dismiss the indictment for failure to charge a crime.

2. Sufficiency of the Evidence: As to this it will suffice to say that we find no error in the court's refusal to direct a verdict of acquittal. Since the evidence upon a new trial, if there be one, may be different, there is no need to discuss the evidence in the present record.

3. The Charge: The principal attack upon the judgment of conviction concerns the charge to the jury. It contained the following instruction:

> "To find membership in the Communist Party you must find that the defendant performed the act of joining the party. The act of joining is crucial. This is not to say that you must find evidence of the very act of joining the party, but rather from all the evidence you must be convinced beyond a reasonable doubt that he was, in fact, a member of the Communist Party, and was accepted as such by the Party."

This is all we can find by way of definition of what constituted membership in the Party. To this instruction the defendant excepted, because the language following the statement that "the act of joining is crucial" made the charge too "vague and indefinite" to constitute any definition at all of what facts the jury must find in order to convict the defendant. Because of the peculiar rule concerning proof in perjury cases, we think the exception was well taken. That rule requires "direct" proof of the crime by two witnesses who testify that the accused violated his oath, or "direct" proof by one witness plus corroborating

circumstances.[6] Since the crime of perjury consists in the contradiction between the accused's oath and his belief, the only "direct" evidence of his guilt would seem to be his own declarations of his belief. But the law is well settled that his declarations, if oral, will not satisfy the rule, although they will if written and adequately corroborated.[7] This distinction was laid down in *United States* v. *Wood*, 14 Pet. 430, which has been often followed.[8] Since only written declarations will suffice, it follows that if the critical issue must be proved by "direct" evidence, there could be no conviction unless the accused had made contradictory written declarations. But it is clear that perjury convictions are not limited to such cases. Hence it must be that the rule peculiar to perjury as to the character of the proof, means that it is the facts from which the jury may infer the accused's state of mind that must be proved by "direct" evidence. And this view is confirmed by Chief Justice Vinson's opinion in *American Communications Assn.* v. *Douds*, 339 U. S. 382, 411, where it is said:

> "* * * while objective facts may be proved directly, the state of a man's mind must be inferred from the things he says or does. * * * False swearing in signing the affidavit must, as in other cases where mental state is in issue, be proved by the outward manifestations

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6 See *United States* v. *Wood*, 14 Pet. 430; *United States* v. *Hiss*, 2 Cir., 185 F. 2d 822, 824, cert. denied 340 U. S. 948; *United States* v. *Otto*, 2 Cir., 54 F. 2d 277, 279; *Clayton* v. *United States*, 4 Cir., 284 F. 537, 539-40; *Radomsky* v. *United States*, 9 Cir., 180 F. 2d 781, 782-3.

7 We lay to one side a possible exception as to contradictory oral declarations made by the accused under oath, as the case at bar involves no declarations of this character. See Wigmore, Evidence, 3rd ed., §2043.

8 *Clayton* v. *United States*, 4 Cir., 284 F. 537, 540; *Phair* v. *United States*, 3 Cir., 60 F. 2d 953, 954; *Hart* v. *United States*, 9 Cir., 131 F. 2d 59, 61; *Fotie* v. *United States*, 8 Cir., 137 F. 2d 831, 840. Compare *United States* v. *Harris*, 311 U. S. 292.

> of state of mind. In the absence of such manifestations, which are as much 'overt acts' as the act of joining the Communist Party, there can be no successful prosecution for false swearing."

Hence the doctrine that perjury must be proved by the direct testimony of two witnesses or one corroborated witness means that the witnesses must testify to some "overt act" from which the jury may "infer" the accused's actual belief.

We do not see how the perjury rule can in practice be applied at all in such a case as the present unless the judge shall single out such "overt acts" as furnish a rational basis for inferring what the accused thought constituted membership and which were supported as the rule requires, and shall then instruct the jury that unless they believe the testimony as to such facts—or at least one of them—and think that because of it, taken with any corroborating evidence, the accused must have believed he was a member, they cannot find him guilty. The jury's verdict of guilt presupposes that they have made some definition of their own as to what the accused thought constituted membership and have found some act by him from which they have inferred that he believed himself a member, as so defined. Surely the definition of membership is a vital part of the "overt acts" from which the accused's belief is to be inferred. Unless the court shall instruct the jury in the manner suggested, the rule becomes no more than that there must be in the "direct" proof some "overt act" from which the jury might "infer" the guilty state of mind, but which they may totally disregard in finding their verdict. To ascribe such meaning to the rule would deprive the accused of the full protection which it is intended to afford him. Moreover, the vagueness of the charge was increased by the instruction that the jury

might draw the reasonable inferences and conclusions from the evidence, whether the evidence be a direct statement of fact or of circumstance. The jury was told, "You may not have direct proof of a fact but you may have circumstances from which you are able to draw reasonable conclusions and deductions." Hence, despite recital in the charge of the rule as to two witnesses or one corroborated witness, the jury may have thought that they could select such evidence as they chose as proof of guilt and were free to convict on circumstantial evidence alone, which is not the law in the federal courts.[9]

As indicated above it is our opinion that the perjury rule requiring direct evidence cannot be applied unless the court specifically declares what are the "overt acts" which the jury must find, and which the court decides are properly supported under the perjury rule and of themselves form a rational support for finding that the accused's oath and his belief conflicted. In the case at bar this demanded that the judge point out what facts so supported would justify a finding that the accused did not believe that he had never been a member of the Communist Party. Whatever may be thought of the archaic rule as to proof of perjury, it is still the law in the federal courts and its breach in this case operated unfairly, for the accused never learned until the filing of the government's brief on appeal what acts the prosecution would contend showed that he believed himself to have been a member of the Party. In opposing a motion for a bill of particulars, counsel for the government argued that it was "most difficult" to define what constituted membership; and the court did not require the prosecution to specify what facts it would rely on to prove an act of joining or to justify an inference that the accused

9 *United States* v. *Otto*, 2 Cir., 54 F. 2d 277, 279; *Clayton* v. *United States*, 4 Cir., 284 F. 537, 539; *Radomsky* v. *United States*, 9 Cir., 180 F. 2d 781, 782-3.

knew he was a member. The result of leaving the issue so at large was that, as the case was tried, the defendant did not know even at the end of the government's case what he had to meet; he could only guess what the prosecution was going to say he thought to be membership. It is now argued that use of the Party's postoffice box in Knoxville in 1937 and the payment of dues to the Party in Washington in 1942-4 prove that he knew he was a member in each of those periods. If there should be another trial, we think that the prosecution should be compelled to declare in a bill of particulars those "overt acts" which it will prove as required in perjury and from which it will argue that the accused believed that he had been a member of the Communist Party. This will not prevent the prosecution from introducing other and corroborating evidence.

Complaint is made of the court's refusal to charge request No. 64, which was that all the jurors must be convinced that the accused was a member of the Party "at a particular time and place," and if some thought he was at one time only and some at another, they could not convict him. That request was right and should be given if there is a new trial; but we are not prepared to hold the failure to give it was reversible error since the substance of it was probably covered, though not so explicitly, by the charge that the jury must be unanimous and that "Proof of membership in the Communist Party at any one time during that period [1934-1944] is sufficient."

4. Rulings in the Course of the Trial: We now turn to questions which may arise again, if there be a new trial. The court denied the defendant's motion to inspect the minutes of his own testimony before the grand jury. We think inspection before trial should have been allowed. As already stated, the essential issue in perjury is whether the accused's oath truly spoke his belief; all else is contribu-

tory to that issue. In deciding it the jury was entitled to know, and the accused was entitled to show, what had gone before the critical question and answer, since this might throw light on how he understood the question and what he meant by his answer. For example, if he had previously testified that he never had a Party card, that might indicate that he believed that without a card he could not be a member. His memory of what he said is no adequate substitute for the minutes themselves. It is one thing to deny the defense access to grand jury minutes which it intends to use for the relatively negative purpose of impeaching a witness; it is quite a different thing to deny an accused access to the minutes of his own testimony which may afford him an affirmative defense. Even if the prosecution's use of the allegedly perjurious answer did not, by itself, open the door to the rest of the defendant's testimony,[10] we think he was entitled to it under the principle of this court's decision in *United States* v. *Andolschek*.[11] We there held that an accused must be given access to his own official reports which might directly support his defense, even though disclosure of such reports was forbidden by a valid administrative regulation.[12] *A fortiori*, access should not be denied where, as here, inspection of the grand jury minutes is a matter within judicial discretion. We see no good reason for suppressing the evidence under these circumstances.

The defendant's request to inspect the grand jury minutes of the testimony of Ann Remington, his former wife, was also denied. Such denial was proper unless, as the

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10 *Cf. United States* v. *Cotter*, 2 Cir., 60 F. 2d 689, 692, cert. denied 287 U. S. 666; Wigmore, Evidence, 3rd ed., §2113.

11 142 F. 2d 503, 506.

12 See also *United States* v. *Grayson*, 2 Cir., 166 F. 2d 863, 870; *United States* v. *Beekman*, 2 Cir., 155 F. 2d 580, 584; *Edwards* v. *United States*, 312 U. S. 473, 481.

defendant contends, Mrs. Remington admitted in her trial testimony that she had changed her story during the course of her grand jury testimony. It is not entirely clear from the present record whether the change of story occurred before or after she began testifying before the grand jury. This ambiguity will undoubtedly be cleared up, if a new trial is had, and it will here suffice to refer to *United States* v. *Krulewitch*, 2 Cir., 145 F. 2d 76, 78-9, reversed on other grounds 336 U. S. 440, which, if the appellant's interpretation of her trial testimony is correct, requires that her grand jury testimony be made available to the defense.[13]

During presentation of the government's case, the appellant offered to prove that a number of prospective witnesses had been called before grand juries other than the one which had indicted him; that the government's purpose in calling the witnesses was to intimidate them; and that some of them had been intimidated. The defense moved to suppress the testimony of all such witnesses on the ground that this method of preparing the government's case was an abuse of process which tainted the entire evidence so obtained. While we agree that if the government's purpose was as charged, its conduct was unfair and ought not to be condoned, we know of no authority, and none has been cited, for suppressing evidence obtained in this manner. We think the only remedy of the defense is to examine such witnesses as it claims were intimidated and prove, if it can, that such was the fact. Evidence of efforts to suppress testimony or evidence in any form like the spoliation of documents is affirmative evidence of the weakness of the prosecution's case.[14] We do not mean that it would be relevant to this issue to show that a grand

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13 See also *United States* v. *Cohen*, 2 Cir., 145 F. 2d 82, 92, cert. den. 323 U. S. 799.

14 See Wigmore, Evidence, 3d ed., §278. *Cf. United States* v. *Freundlich*, 2 Cir., 95 F. 2d 376, 378-9; *People* v. *Chin Hane*, 108 Cal. 597, 603.

jury was called for the express purpose of intimidating witnesses. That is a matter for disciplinary action by the court and does not concern the accused. His interest in the matter is limited to intimidation of his prospective witnesses, which can be brought out as part of the defense evidence which goes to the jury.

Over defense objections the prosecutor was permitted to make numerous references to the Attorney General's list of subversive organizations during the defendant's cross-examination. This was error, for the list is a purely hearsay declaration by the Attorney General, and could have no probative value in the trial of this defendant.[15] It has no competency to prove the subversive character of the listed associations and, failing that, it could have no conceivable tendency to prove the defendant's alleged perjury even if it were shown that he belonged to some or all of the organizations listed.

We will not at this time deal with the appellant's contention that the indictment should be quashed because of improprieties in the grand jury room which were allegedly committed by the foreman of the grand jury. It is contended that the foreman, one Brunini, had a financial interest in a book which the government's chief witness was writing and that he exercised undue influence in the procurement of the indictment, particularly during the grand jury's examination of the defendant. Since we have already held that the accused must be given access to the minutes of his own testimony before the grand jury, it will appear upon inspection whether Brunini abused his powers, at least in that part of the proceedings. The indictment should not be quashed unless undue influence is shown.[16] It is true that Brunini's alleged abuse of powers

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15 *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123 *passim*.

16 *United States* v. *Thompson*, 2 Cir., 144 F. 2d 604, 606, cert. den. 323 U. S. 790; Fed. Rules Cr. Proc., Rule 6(b)(2), 18 U. S. C. A.

may have occurred while the defendant was not on the stand, and that without examination of the rest of the grand jury minutes the defendant may not find it possible to show undue influence. But we are unwilling to turn the indictment procedure into a separate trial. Although it is possible that some abuses may thus go uncorrected, it has been the policy of the law, and we think a sound one, to correct only such irregularities as the accused can prove, since an indictment is, after all, no more than an accusation.

The remainder of the appellant's contentions do not require discussion. We wish, however, to admonish counsel for the prosecution that in case of a retrial there should be no repetition of the cross-examination attack upon defense witness Redmont's change of name. Redmont testified that he had changed his name for professional reasons and that he had done so pursuant to court order. On cross-examination the prosecutor continued his inquiry of this matter long after it became clear that the change of name had no relevancy to any issue at the trial, and could only serve to arouse possible racial prejudice on the part of the jury.

Judgment reversed and cause remanded.

DARK PAGE BLEEDTHRU

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 387

WILLIAM WALTER REMINGTON, *Petitioner*,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION BY THE UNITED STATES FOR LEAVE TO APPLY TO THE DISTRICT COURT FOR LEAVE TO DISMISS THE INDICTMENT.

The United States hereby moves for leave to apply to the District Court for leave to dismiss the indictment in the instant case.

Petitioner was indicted and convicted for perjury in having denied before a grand jury that he had "ever been a member of the Communist Party." His conviction was reversed by the Court of Appeals for errors occurring during the trial. Since the court refused to hold the indictment invalid or to direct an acquittal, it left the Government free to try petitioner again. The petition for certiorari challenges the action of the Court of Appeals principally upon the grounds (1) that improper conduct of a grand juror invalidated the

indictment (Pet. I, pp. 9-31);[1] (2) that the indictment was not specific enough in informing petitioner of what he had to meet (Pet. II, pp. 28-31);[2] and (3) that the court below (in reversing the District Court on the point) did not give proper effect to the "direct evidence" rule applicable in perjury cases in relation to the nature of the proof required to show membership in the Communist Party (Pet. III, pp. 31-49, App. vi-x).

On October 25, 1951, a grand jury which had been empaneled in the Southern District of New York on October 1 returned an indictment in five counts charging that at his trial in the instant case petitioner falsely testified (1) that he never knowingly attended a Communist Party meeting, (2) that he never paid Communist Party dues, (3) that he never gave any secret classified information to any unauthorized person, (4) that he never asked anyone to join the Communist Party, and (5) that he was not a member of and did not know until last year of the existence of the Young Communist League at Dartmouth College during his attendance there. Petitioner was arraigned under the new indictment on October 30, pleaded not guilty,

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[1] The court below refused to pass upon this question, but left the matter open for further exploration in the event of a new trial, at which the petitioner would have access to the grand jury minutes of his own testimony. (Pet. App. viii).

[2] The court below held the indictment sufficient on its face, but also stated that the prosecution should furnish a bill of particulars in the event of a new trial (Pet. App. v-vi, x).

and the trial has been tentatively set for December 10.

This new indictment is not subject to any of the alleged infirmities upon the basis of which the petition for certiorari has attacked the validity of the indictment herein. Under the new indictment, there is no question as to the propriety of the conduct of any of the grand jurors. The acts of perjury charged are specific. And the question raised by the petition as to the application of the perjury rule to a charge of falsification as to membership in the Communist Party will not be present in a trial on the directly provable allegations of perjury charged in the new indictment. Any possible defect in the first indictment or in the procedure whereby it was obtained, or in the evidence or charge to the jury at the first trial, would not prevent a prosecution for perjury committed during the course of that trial. *United States* v. *Williams,* 341 U.S. 58.

Under the judgment of the Court of Appeals, the Government would be entitled to re-try the petitioner under the first indictment. But the Government does not intend to press that charge, and will dismiss that indictment as soon as leave of court is obtained. If a petition for certiorari had not been filed, the Government would have a right, with leave of the District Court, to file a dismissal of the first indictment in that court. Rule 48(a), Rules of Criminal Procedure. The judgment of the Court of Appeals reversing the conviction does not, of course, preclude the government from dismissing

the indictment instead of proceeding to a new trial.[3] The fact that a petition for certiorari has been filed, however, makes it uncertain whether the District Court may grant leave to dismiss while the case is pending in this Court, without leave of this Court.

In order to remove this possible obstacle to dismissal in the District Court, the permission of this Court is requested. Inasmuch as the Court may not wish to dispose of the petition for certiorari until the indictment is dismissed in the District Court, the Court may deem it appropriate to grant the Government leave to move to dismiss in the District Court, meanwhile holding the petition for certiorari. Another procedure which would adequately protect the rights of all involved would be to deny the petition for certiorari without prejudice to a petition for rehearing if the indictment is not dismissed in the District Court.[4]

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

NOVEMBER, 1951.

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[3] The mandate of the Court of Appeals has gone down.

[4] If this motion is not granted, the Government will file a brief in opposition to certiorari, based in part on the prematurity of the petition in view of the need for a new trial before petitioner can be convicted. Inasmuch as the Government does not intend to re-try petitioner under the indictment here involved, thereby mooting the issues sought to be raised, the prematurity is even more evident.

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OCTOBER TERM, 1951

No. 387

WILLIAM WALTER REMINGTON,
Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONSE BY PETITIONER TO MOTION BY THE UNITED STATES FOR LEAVE TO APPLY TO THE DISTRICT COURT FOR LEAVE TO DISMISS THE INDICTMENT

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Counsel for Petitioner.

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JOSEPH L. RAUH, JR.,
JOHN K. TABOR,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 387

WILLIAM WALTER REMINGTON,
Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONSE BY PETITIONER TO MOTION BY THE UNITED STATES FOR LEAVE TO APPLY TO THE DISTRICT COURT FOR LEAVE TO DISMISS THE INDICTMENT

Petitioner, William Walter Remington, refuses his consent to the government's motion for leave to dismiss the indictment and requests this Court, in order to prevent irreparable prejudice to petitioner's rights and a grave miscarriage of justice, (i) to assign the government's motion for full briefing and oral argument pursuant to Rule 7(2) or, (ii), in the alternative, to grant the petition for certiorari and postpone decision on the motion until the argument on the merits.

The government's motion fails to disclose to the Court the serious issues involving the Constitution of the United States and the integrity of the judicial process which the motion in fact raises. The government seeks to avoid

these fundamental issues by asking this Court to rule upon its motion for a dismissal of the indictment without consideration of the pending petition for certiorari. Petitioner believes that the government's motion cannot properly be considered *in abstracto* without relation to the issues raised by the petition and, therefore, urges the Court to consider the petition for certiorari at this time along with the government's motion. To this end, we attach hereto as Appendix B a copy of the petition for certiorari. In view, however, of the inadequate statement of the case contained in the government's motion, the facts set forth in the petition in so far as they bear upon the present motion are summarized herein for the convenience of the Court.

Statement of Facts

On July 30, 1948, ex-Communist spy, Elizabeth T. Bentley, appeared before an investigating committee of the United States Senate and charged Remington with having been a member of the Communist Party in the early war years and with having given her secret government information at that time (R. 1312). Remington promptly denied her accusations under oath. Grave doubt was cast upon Bentley's story when, in February, 1949, Remington was publicly cleared by the President's Loyalty Review Board of charges based on Bentley's accusations (R. 1355-9) and again when, in February, 1950, a libel suit based on Bentley's charges on a television program was settled by the television network and the sponsor paying Remington $9,000 (R. 1372, 1382).

Nevertheless, in May, 1950, Remington was subpoenaed before a grand jury in the Southern District of New York, and examined at length regarding Bentley's charges and supporting evidence (R. 2623). On June 8, 1950, Remington was indicted for denying to that grand jury that he had "ever been a member of the Communist Party" (R. ix). Remington pleaded not guilty, and on

December 18, 1950, his trial commenced. During the course of the trial, in at least partial explanation of the indictment of a man previously cleared, the following facts appeared:

(1) At the time of the indictment, the foreman of the indicting grand jury, one John Brunini, was collaborating with chief prosecution witness Bentley in the preparation and publication of a book of memoirs (R. 1598-1607), the success of which depended upon the rehabilitation of her credibility through Remington's indictment.

(2) The prosecution's case was presented to the grand jury by Thomas E. Donegan, a Special Assistant to the Attorney General (R. 1515-16, 1522-4), who had previously been Bentley's personal attorney in litigation arising out of her espionage activities (R. 1388-90, 1280-5).

(3) One of the first witnesses before the grand jury was Joseph A. Egan, Bentley's present personal counsel, who had represented Bentley in the libel suit brought against her by Remington (R. 1391, 1496) and whose testimony could only have been incompetent and prejudicial since he did not know Remington.

(4) Foreman Brunini and prosecutor Donegan interrogated Remington, during a five-day grilling before the grand jury (R. 2664), on matters many of which were wholly unrelated to any crime, but directly related to the public dispute between Bentley and Remington as to whether he had ever been a member of the Communist Party (R. 1515-16), and finally indicted him for denying such membership.

As soon as these facts became known during the course of the trial, petitioner moved to dismiss the indictment (R. 1513). The United States Attorney vigorously opposed this motion to dismiss, although he announced that the "files of the government contain a full narrative of these incidents" and that he had discussed these matters with the Attorney General of the United States (R. 1526-7). Despite the fact that the United States

Attorney had had this "full narrative" of the facts in his possession since the time of the voting of the indictment and had deemed them sufficiently serious to take up with his superior in Washington, he failed either to enter a *nolle prosequi* at that time, or to make these facts known to the defense. The misconduct in failing to disclose was compounded by the United States Attorney's effort, through "trick" questions to defendant's witnesses and by shouting to the jury that these witnesses were "liars" (R. 1631), to create the impression to judge and jury that the entire story of the Brunini-Bentley collaboration was a fabrication. These tactics were all the more reprehensible because the United States Attorney, with the district judge's consent, was at the same time denying petitioner the right to examine the "full narrative of these incidents" and the minutes of the indicting grand jury (R. 1367).

The district court refused to dismiss the indictment (R. 1527, 1624-5), Remington was found guilty by the jury (R. 4027) and given the maximum sentence provided by law (R. 4041). Remington appealed his conviction and on August 22, 1951, the court of appeals reversed the action of the district court and remanded the cause. The court held, *inter alia*, that the judge's charge to the jury had been erroneous, that the defendant had not known until the trial was over what he had to meet, and that many other errors had been committed.*

On September 20, 1951, petitioner applied to Mr. Justice Jackson for a 30-day extension of time within which to file his petition for writ of certiorari, pointing out that the court of appeals had

> (i) Failed to dismiss the indictment, despite proof in the record that at the time of the indictment

* The opinion of the court below is reprinted at pp. iii-xiv of the petition for certiorari (hereinafter referred to as "petition"). The typewritten record is on file with the Clerk of this Court, along with a motion to dispense with printing the record (Petition, pp. i-ii).

the foreman of the indicting grand jury was collaborating with the chief prosecution witness, one Elizabeth T. Bentley, in writing a book based in part upon her charge that the defendant had been a member of the Communist Party;

(ii) Failed to grant defendant's prayer for acquittal, despite the prosecution's admission that it had no proof whatever of an "act of joining the Party," as required by *Communications Ass'n.* v *Douds,* 339 U. S. 382, 410-411 (1950), the court of appeals holding that it was not necessary for the government either to allege or prove that the defendant had in fact been a member of the Communist Party.

On the same day, September 20, 1951, Mr. Justice Jackson granted the application for a 30-day extension of time and notice was promptly served upon the government. On October 19, 1951 the petition for certiorari (Appendix B) was filed in this Court.

Six days later, on October 25, 1951, petitioner was re-indicted on 5 counts charging that at his trial in this case he had testified falsely in denying five items of evidence introduced by the government in support of its contention that he had been a member of the Communist Party: (1) that he ever knowingly attended Communist Party meetings, (2) that he had given information to Bentley to which she "was not entitled", (3) that he had ever paid Communist Party dues, (4) that he ever asked anyone to join the Communist Party, and (5) that he had any knowledge of the existence of the Young Communist League at Dartmouth College, where he had been a student from 1934 to 1939. The new indictment is annexed as Appendix A.

Petitioner pleaded not guilty to the re-indictment on October 30, 1951. District Judge Leibell ruled that the defense should be allowed time to file its motions directed

to the re-indictment until after the Supreme Court had acted upon the petition for certiorari based upon the first indictment. Judge Leibell set December 10, 1951, as the date for the filing of these motions, but gave petitioner the right to ask for further time if final action by this Court had not been taken by that date. On November 2, 1951, three days after Judge Leibell's ruling, the government filed its motion for leave to apply to the district court for leave to dismiss the indictment, stating that the defendant had been re-indicted on counts which were "not subject to any of the alleged infirmities upon the basis of which the petition for certiorari had attacked the validity of the indictment herein", and that it no longer intended to press the charge that the defendant had lied when he denied that he had ever been a member of the Communist Party.

Rule Involved

Rule 48(a) of the Federal Rules of Criminal Procedure provides as follows:

> "RULE 48. DISMISSAL.
>
> "(a) *By Attorney for Government.* The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant."

I

The indictment cannot be dismissed without petitioner's consent.

The government's motion for leave to dismiss at this stage of the proceedings raises a novel and important question under Rule 48(a) which does not appear to have been passed upon by any court. It is petitioner's belief,

however, that Rule 48(a) prohibits the dismissal of the indictment at this stage of the proceedings without the consent of petitioner, which is hereby refused.

Rule 48(a) provides that dismissals may not be filed "during the trial" without the consent of the defendant. While the language of the Rule may be deemed to be ambiguous, its purpose is not. The Notes to the Rules contain a clear statement of purpose:

> "4. The second sentence is a restatement of existing law, *Confiscation Cases,* 7 Wall. 454-457; *United States* v. *Shoemaker,* 27 Fed. Cases No. 16, 279 (C.C. Ill.). If the trial has commenced, the defendant has a right to insist on a disposition on the merits and may properly object to the entry of a *nolle prosequi.*" (Notes to the Rules of Criminal Procedure for the District Courts of the United States, p. 44.)

In the *Shoemaker* case, *supra,* the prosecuting attorney had abandoned the prosecution and entered a *nolle prosequi,* over the objection of the defendant, after the jury had been impaneled and witnesses sworn. The court held that the defendant under such circumstances was entitled to a verdict of acquittal, for otherwise "is not the defendant manifestly prejudiced? Was he not in peril?" See also *United States* v. *Stowell,* 27 Fed. Cas. No. 16,409; *United States* v. *Schumann,* 27 Fed. Cas. No. 16,235.

Petitioner is contending before this Court, as he did before the district court and the court of appeals, that he is entitled to a judgment of acquittal because the government has conceded that it has no evidence that he ever joined the communist party. "If the trial has commenced", petitioner has been put in jeopardy, and we submit that he must have "a right to insist on a disposition on the merits", whether the issue of his guilt or innocence is pending before the district court, before the court of appeals, or before this Court on petition for writ of certiorari. Otherwise the prosecution could harass an unpopular defendant *ad infinitum* by bringing criminal

proceedings against him, pursuing them as long as success appeared probable, dropping them as soon as it appeared that the defendant might be successful, and beginning again with a new indictment. Indeed, the considerations of hardship and harassment which underlay the early cases and the provision of the Rule requiring defendant's consent to a dismissal after the trial has commenced in the district court, apply with even greater force while the case is pending in the appellate courts. See also Rules 1, 2, 54(a)(1). The more time and money consumed by the defense, the greater the right of the accused to a ruling on the merits. In the language of the Note to Rule 48(a), since "the trial has commenced, the defendant has a right to insist on a disposition on the merits and may properly object to the entry of a *nolle prosequi.*"

In view of the novelty and importance of this question, it is respectfully suggested that a full briefing, together with oral argument, will be of assistance to the Court in arriving at its decision.

II

This Court should deny the government leave to dismiss the indictment because dismissal at this stage in the proceedings will gravely prejudice petitioner's rights.

Petitioner believes that, as demonstrated in Point I above, Rule 48(a) prohibits the dismissal of this indictment without petitioner's consent. Even if this view of the Rule should be rejected, however, Rule 48(a) specifically provides that no indictment may be dismissed except "by leave of court". We urge the Court to deny such leave in the interests of justice.

The "leave of court" provision in the first sentence of Rule 48(a) was not contained in either the Preliminary

Draft or the Second Preliminary Draft of the Rules. These drafts authorized dismissal without leave of court prior to the commencement of the trial, the rule theretofore prevailing in the federal courts. See Advisor's Notes to Drafts, and *Confiscation Cases*, 7 Wall. 454, 457 (1868). This Court, however, rejected the proposed rule as drafted and adopted Rule 48(a) as it now stands, which permits the filing of a dismissal only by leave of court.

Counsel for petitioner have been unable to find any cases arising out of the "leave of court" provision of Rule 48(a). It seems clear, however, that one of the purposes of this provision was to prevent prosecutors from using *nolle prosequi* as a weapon to harass and ultimately convict one who lacks the resources to withstand such tactical maneuvers. The Notes to Rule 48(a) as adopted expressly state that the first sentence of the rule changes existing federal law and "is similar to the rule now prevailing in many States." Notes to the Rules of Criminal Procedure for the District Courts of the United States, page 43. The state cases hold that a prosecutor cannot *nolle prosequi* an indictment for the purpose of bringing the suit before a friendlier court, or at a later time more advantageous to the state, or on a different and more easily proven charge. *Coleman* v. *State*, 83 Miss. 290, 35 So. 937 (1904); *State* v. *Milano*, 138 La. 989, 71 So. 131 (1916); *Ex parte Lancaster*, 206 Ala. 60, 89 So. 721 (1921); *Love* v. *State*, 272 Pac. 1035 (1928) (Cir. Ct. of App. Okla.); *People* v. *Bogolowski*, 317 Ill. 460, 148 N. E. 260 (1925). To "harass the accused by indictment and prosecution * * * cannot be countenanced or permitted" (*Coleman* v. *State, supra* at 940) as such a practice "is not calculated to increase the respect that is due to the courts." *State* v. *Milano, supra* at 133. It seems clear that in preferring the state to the federal rule the Court was seeking to prevent prosecutors from dismissing indictments for the purpose of "getting" defendants in another forum or at another time or otherwise to prejudice the rights of the defendant.

The same effort at protection for the defendant underlies the Rule governing dismissal of actions in civil cases at the instance of the plaintiff. In pertinent part, Rule 41(b) of the Federal Rules of Civil Procedure provides

> "* * * an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. * * *"

The courts have held that, under this Rule, a plaintiff will not be allowed to dismiss his case in the federal courts to the prejudice of the defendant. When a dismissal is sought "not for the purpose of promoting justice, but for the purpose of defeating justice, and prolonging litigation, and depriving the defendant of a substantial right, the court ought to put its face against it." *Palmer* v. *Delaware, L. & W. R. Co.*, 222 Fed. 461, 464 (N.D. N.Y. 1915); *Henjes* v. *Aetna Insurance Co.*, 39 F. Supp. 418, 419 (E.D. N.Y. 1941). Dismissal will also be denied if there are elements "in the nature of the defense, the conduct of the parties, or circumstances appearing in the record which show that it would be inequitable to allow the dismissal without prejudice." *Olsen* v. *Muskegon Piston Ring Co.*, 117 F. 2d 163, 165 (C.C.A. 6, 1941). The trouble and expense to which defendant has been put is often the significant factor in persuading the court to exercise its discretion by denying the motion to dismiss. *Cincinnati Traction Bldg. Co.* v. *Pullman Standard Car Mfg. Co.*, 25 F. Supp. 322 (D. Del. 1938); *Colonial Oil Co.* v. *American Oil Co.* (E.D. S.C. 1943), 3 F.R.D. 29. See also for other factors which influence the courts' discretion: *In re Barnett*, 124 F. 2d 1005 (C.C.A. 2, 1942); *Chandler Bldg. Corp.* v. *Shannon*, 1 F.R.D. 105 (D. Cal. 1939); *Evans* v. *Teche Lines*, 112 F. 2d 933 (C.C.A. 5, 1940); *Butler* v. *Denton*, 150 F. 2d 687 (C.C.A. 10, 1945).

The pre-Rule 41(a) cases were to the same effect. Judge Learned Hand stated plaintiff cannot discontinue his suit "when the plaintiff's purpose is so to maneuver the

litigation that the defendant will lose his existing advantage." *Young* v. *So. Pac. Co.*, 25 F. 2d 630, 632 (C.C.A. 2, 1928). See also *Hat-Sweat Manufg. Co.* v. *Waring*, 46 Fed. 87 (C.C. S.D. N.Y. 1891); *City of Detroit* v. *Detroit City Ry. Co.*, 55 Fed. 569 (C.C. E.D. Mich. 1893) (per Taft, J.).

Certainly federal courts, in interpreting the phrase "leave of court" in Rule 48(a), will not be less solicitous of the rights of accused in criminal cases than they have been of the rights of defendants in civil cases under the similar Civil Rule 41.

We turn now to the prejudice to petitioner inherent in the government's motion.

A

A dismissal will prevent an adjudication by this Court of the unconstitutional conduct of the United States Attorney which affects the validity of the reindictment.

There can be little question that, under the decisions of this Court (Petition, pp. 22-27) the initial indictment against the petitioner would have been promptly dismissed if the facts concerning the gross improprieties in the grand jury proceedings had been known by the petitioner at the same time that they were known to the government. The action of the United States Attorney in withholding this information from the petitioner and then seeking to suppress the facts by his own misconduct at the trial was a clear deprivation of due process of law.

This Court has stated that the government's suppression of evidence favorable to a defendant is a deprivation of due process of law. *Pyle* v. *Kansas*, 317 U. S. 213. The withholding of information by the United States Attorney is equally a violation of due process. *United States* v. *Ragen*, 86 F. Supp. 382 (N.D. Ill. 1949); *In re Almeida*, —— F. Supp. ——, 19 Law Week. 2543 and of those "civilized standards of procedure" which this Court is zealous to protect, *McNabb* v. *United States*, 318 U. S. 332, 340.

Petitioner was on the witness stand solely because the United States Attorney violated the tenets of his office and the Constitution of the United States. The government, in its reindictment, is seeking to prosecute the defendant for statements he made on the stand at the very time that the United States Attorney was depriving him of due process of law. The questions asked, just like knowledge gained, "by the Government's own wrong cannot be used by it * * *" *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392; *Nardone* v. *United States,* 308 U. S. 338, 341. Indeed, the alleged crime could never have been committed except for the "Government's own wrong." Because defendant was being deprived of due process of law at the very time the questions which form the basis of reindictment were asked, and because the government cannot take advantage of its own wrong, the *Williams case* (341 U. S. 58) provides no comfort for the government in support of the reindictment. We cannot believe that this Court intended the *Williams* case to validate indictments stemming from governmental action depriving the defendant of due process of law.

In the petition for certiorari we demonstrate that the decisions below refusing to dismiss the indictment because of the gross improprieties in the grand jury proceedings, unless petitioner were able to present proof that the foreman actually abused his position, conflict with the applicable decisions of this Court and constitute an important question of federal law involving the integrity of the judicial process (Petition, pp. 9-27). But, in addition to the public interest involved in the settlement of this fundamental issue, there would be grave prejudice to the private rights of petitioner if the indictment were dismissed at this stage of the proceedings without a decision of this Court. It would be most inequitable to require petitioner to prove in the new proceedings on the reindictment all the facts contained in the present record. Indeed, it may not be possible, in view of the government's

efforts at suppression, to make such proof. The trial and the appeal to the court below exhausted every resource of both petitioner and his family so that at the present time he is heavily in debt and without funds to defend against another prosecution undertaken with the unlimited resources of the government. Both public interest and private right require a decision on this most important question and a denial of the leave of court for dismissal.

B

A dismissal will prevent an adjudication by this Court that petitioner is entitled to a judgment of acquittal and thus will subject him to the possibility of further indictments.

Petitioner moved in the district court and the court of appeals for a judgment of acquittal on the ground that as a matter of law, based upon the government's concessions, it was apparent that there was not sufficient evidence under the perjury rule to support a conviction. In the petition for certiorari, we again urge an acquittal on this same ground and set forth basic questions in the law of perjury which demand review and determination by this Court (Petition, pp. 31-49).

The government seeks to avoid this review by announcing that it does not intend to retry petitioner on the indictment here involved for denying membership in the Communist Party. But of what protection is that to the petitioner for the future? Having shifted from the denial of membership in the Communist Party to the denial of certain associations with the Communist Party, the government can equally well shift back again. Indeed, the reindictment is for petitioner's statements at the trial which are of no significance and a shift back to petititioner's denial of membership may be promptly made. Of what public import is petitioner's denial at the trial

that he knew about a particular organization when he was in college or that he went to certain meetings when he was 19 years old or that he gave Miss Bentley information to which she was not entitled when he was in the government 10 years ago?* The United States Attorney or a new United States Attorney may determine to revert to the earlier charge—a false denial of membership in the Communist Party—and defendant could then be retried on this charge if the indictment is dismissed without a judgment of acquittal.

A judgment of acquittal would prevent the government from seeking to indict petitioner in the future for denying membership in the Communist Party. Moreover, as we

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* This count illustrates the constantly declining public significance of the charges against petitioner. Bentley's original charge against Remington was that he had given her secret information for a treasonable purpose. When Remington was cleared of this charge by the Loyalty Review Board, the attack was focused on his denial of past membership in the Communist Party. Now that the government realizes that it has failed to sustain its proof on that charge, the attack is reduced to a charge of falsely denying that he had given Miss Bentley information to which she "was not entitled".

We note the government's assertion in this motion that defendant was re-indicted for falsely testifying "that he never gave any *secret classified information* to any unauthorized person." Count II of the indictment, annexed hereto as Appendix A, after reciting that the defendant had denied that he gave Bentley or anyone else "secret classified information or any information to which they were not entitled," or any information destined for Russia, continues in the charging paragraph as follows:

> "The aforesaid testimony of WILLIAM WALTER REMINGTON, as he then and there well knew and believed, was untrue in that he gave to Elizabeth T. Bentley material and information obtained by him by reason of his employment by the United States Government, and to which the said Elizabeth T. Bentley was not entitled (Title 18, Section 1621, U.S.C.)."

Similarly in Count V, the government asserts on this motion that defendant was re-indicted for falsely denying that he had ever been a member of the Young Communist League. Here again the indictment charges only that his testimony about the Young Communist League "was untrue in that he knew of the existence of the Young Communist League * * *".

show in the next point, a judgment of acquittal might also have a determinative effect upon the reindictment, for the cases indicate that a man cannot be indicted for perjury for denying parts of the whole after he has been acquitted of denying the whole. (See *infra.*)

The unlimited resources of the government are such that, if the prosecution can dismiss indictments after long trials and hard-fought appeals, no accused person will ever be able properly to defend himself. Petitioner's entire resources have gone into the defense of this action. The government's effort to prevent him from obtaining an adjudication may effectively deny him his day in court.

III

The Court should not assist the government in this harassing maneuver by exercising its discretion to grant the government's motion.

By its present motion the government invokes the aid of this Court in support of a maneuver which we believe should not be sanctioned by any court. As we saw at pages 9-11, *supra,* the courts have frequently refused to permit a prosecutor to enter a *nolle prosequi* for the purpose of harassing a defendant or otherwise obtaining an unfair advantage over him. We submit that if the government can drop a prosecution for perjury at any time after the trial has commenced, and re-indict the defendant for denials of various elements of the original alleged perjury, an engine of harassment and persecution of almost limitless possibilities has been devised which has no precedent in law and which should not be sanctioned by this Court. For it permits an over-zealous prosecutor to pursue an individual, whether he be innocent or guilty, almost *ad infinitum.*

In its motion papers the government suggests that its procedure is supported by the recent case of *United States* v. *Williams,* U. S. Sup. Ct., April 23, 1951. To be sure, under the *Williams* case, a defendant can be indicted for perjury for denying at his trial for a substantive crime that he had committed that crime. But here the government seeks to go much further. If the government's present maneuver is proper, it means that Williams, having been convicted of the substantive crime of "using third degree methods" and of perjury for denying that he had done so, can now be further indicted and further punished for denying as many details of the alleged beating as he may have been questioned about either before the grand jury, in the course of his trial for the substantive offense, or in the course of his trial for perjury. Thus the length of the sentence which Williams may be compelled to serve is dependent upon the whim of the prosecutor and his ingenuity in framing questions, rather than upon the Act of Congress. As long as Williams sticks to his denial of the substantive crime, he can be re-indicted and resentenced *ad infinitum.*

Moreover, this procedure permits not only the limitless punishment of a guilty perjurer, but the limitless prosecution of an innocent man who seeks to defend himself against a charge leveled against him. For if he denies the charge under oath, he may first be indicted for perjury for that denial. If it appears after long and expensive litigation that he may succeed on appeal in establishing his innocence, the proceeding can be dropped and he can be compelled to defend himself again because in the course of his defense he has denied the details of the charge. If it appears that he might be successful at that trial and the prosecutor is sufficiently persistent, there seems to be no reason why that charge cannot also be dropped, and he can then be indicted for allegedly false denials of further details. Thus he can be forced to defend himself from one charge after another until finally, his resources exhausted and finding himself no longer able

to defend himself, he is forced to give up the struggle to clear his name, and "recant".

We submit that the perjury statute was never intended to serve such a purpose. We do not believe that more than a single crime of perjury can be predicated on statements under oath relating to a single subject, made during the course of a single continuous investigation.

In *State* v. *Shannon*, 136 Me. 127, 3 A(2d) 899 (1939), 120 A.L.R. 1166, the defendant had been acquitted of a charge of perjury based upon certain answers given during his rebuttal testimony in a civil trial. Thereafter he was indicted for other testimony relating to the same subject matter given on a different day during his direct and cross examination at the same trial. It was held that this was double jeopardy, the court saying (136 Me. 127 at 135, 3 A. (2d) 899 at 904, 120 A.L.R. 1166 at 1171):

> "• • • The State, in the first indictment, could have assigned in a single count each and every false statement which the respondent made in the entire course of the civil trial and alleged a single day certain with a continuando as the time of the commission of the alleged crime. If it had done so, proof of any one assignment of perjury would have warranted a conviction, but only one penalty could have been imposed. One crime only would have been charged. *State* v. *Nelson*, 29 Me. 329, 335. See cases already cited. Having elected to prosecute the respondent for a part of his alleged perjury, the State cannot now divide the offense with which he is charged 'into several parts according to time or conduct for the purpose of basing separate prosecutions upon the various divisions.'"

Similarly in the early case of *State* v. *Bishop*, 1 D. Chip. 120 (Vt. 1797), the court overruled defendant's contention that an indictment charging several separate allegedly false statements in a single count of perjury was "a charge of separate and distinct crimes", saying (p. 123): "• • • if it is, there might be so many different prosecutions commenced, and so many distinct punishments inflicted in con-

sequence of a single oath, and false swearing under that oath, which would be new, and even absurd."

To the same effect see *Black* v. *State,* 13 Ga. App. 541, 79 S. E. 173 (1913); *McLaren* v. *State,* 4 Ga. App. 643, 62 S. E. 138 (1908); *State* v. *Bordeaux,* 93 N. C. 560 (1885); *State* v. *Reidt,* 54 S. D. 178, 222 N. W. 677 (1929); *State* v. *Anderson,* 35 Utah 496, 503, 101 Pac. 385 (1909).

The same rule has been applied in cases of contempt, an analogous offense against the administration of justice: A person can be punished for only a single contempt for repeated refusals to answer a series of questions relating to the same subject. Thus in the case of *United States* v. *Emspak,* 95 F. Supp. 1012 (D. D. C. 1951), the defendants had refused to answer as many as 68 questions and, therefore, were adjudged in contempt. The district court held that the enumeration of the successive refusals in separate counts was proper because different proof was required to establish the various refusals; but it held that the sentence could only be the maximum sentence for a single contempt. See also *United States* v. *Yukio Abe,* 95 F. Supp. 991 (D. Hawaii 1950).

The state cases are in accord. The recent case of *Fawick Airflex Co.* v. *United Electrical, R. & M. Wkrs.,* 92 N. E. 2d 431 (Ohio 1950), presents the question in a situation remarkably similar to that before this Court. There the defendant on cross-examination was asked (p. 433):

"Are you a member of the Communist Party?"

"Have you ever been a delegate as the representative at a Communist Party meeting in the State of Ohio?"

"Did you attend a State convention of the Ohio Communist Party on April 30, 1944, held at Public Hall?"

When the witness refused to answer these questions, he was adjudged guilty of three offenses of summary contempt. On appeal the court held, *sua sponte,* that the trial court had erred in considering the three refusals to answer three contempts, saying (p. 436):

"It appears to the members of this court that the questions were of such character that they should be

treated as an inquiry into but a single subject. The first question asked the witness directly was whether he was a member of the Communist Party. When he refused to answer, other questions were then asked, which, if answered in the affirmative, would have established an inference that he was such member. In fact, the entire inquiry was directed toward the establishment of but one fact. The witness' refusal to answer the three questions under discussion, constituted, in the opinion of the members of this court, but a single contempt, for the reason that they all had to do with the same subject matter."

As was said in *People* v. *McDonnell,* 100 N. Y. S. 2d 463 (1950) at page 467, a contempt case raising the same point:

"* * * To hold otherwise would enable a prosecutor to ask an unlimited number of questions concerning the same subject matter or even to ask the same question in various forms, with the net result that a witness might be incarcerated for the balance of his life."

To be sure, the foregoing cases relate to proceedings at a single hearing, or at a single trial. But we do not believe that the principle involved should be so narrowly limited. It seems to us that testimony relating to a single subject under investigation should be the subject of only a single charge of perjury even though the investigation continues through several phases. Particularly, this should be so where both the investigating authorities and the questions asked and answers given at the successive stages are substantially the same.

The new indictment in the instant case is based upon the denials by this petitioner of the elements involved in the denial which formed the basis of the first indictment: whether or not he had ever been a member of the Communist Party. While we have not even yet been permitted to examine the record of petitioner's examination before the grand jury, that record has been sealed and can be examined by this Court. We assert with full confidence that those minutes will show that he was examined on the same subjects at length before the grand jury and sub-

stantially the same questions asked and answers given. Under the cases hereinabove cited, all these denials could have been included in the first indictment either as separate counts or as separate "specifications of perjury" in a single count. Had this been done, he could not have been punished for more than a single perjury, and it follows that he could not have been re-indicted on account of any of them after he had been finally either acquitted or convicted under any count of the first indictment. We submit that the government cannot, in such circumstances, withhold a part of the alleged perjury from the first indictment and hold it in reserve for a second prosecution to be brought in the event the first proceeding should develop in a manner unsatisfactory to the government.

To permit the prosecutor to proceed first upon the answers to some of the questions before the grand jury, and then shift and re-indict on account of answers to other questions regarding the same subject matter which were asked both before the grand jury and the pettit jury, would lead to the very evil referred to in *State* v. *Shannon*, *supra* (136 Me. at 135, 3 A. 2d 899 at 904, 120 A.L.R. at 1171):

> "* * * Having elected to prosecute the respondent for a part of his alleged perjury, the State cannot now divide the offense with which he is charged 'into several parts according to time or conduct for the purpose of basing separate prosecutions upon the various divisions.'"

The crime of perjury is in several respects *sui generis* and unlike any other crime. As we point out in our petition for certiorari, the court below took the position that it consisted solely of a state of mind. We do not agree with that court's conclusion that a man can be convicted merely upon proof of his state of mind. But we do agree that as a matter of philosophy, the crime of perjury essentially consists of a state of mind, which continues until and unless defendant admits his guilt. Having once denied a charge, the defendant, whether innocent or guilty, must necessarily either live with that denial or renounce

it. As often as the charge is repeated, if he has the hardihood to defend himself, he must repeat his denial, and of course that means also that he must also deny the details of the charge; otherwise he must admit it.

In this sense the crime of perjury is distinguishable from such crimes as thefts of mail and defrauding by mail *e.g., Baddars* v. *United States,* 240 U. S. 387 (1916); *Mitchell* v. *United States,* 142 F. 2d 480 (10th Cir. 1944) but *cf. Johnston* v. *Lagomarsino,* 88 F. 2d 86 (9th Cir. 1937); *Stevens* v. *McClaughry,* 207 Fed. 18 (8th Cir. 1913); or illegal sales of liquor, *Bossio* v. *U. S.,* 16 F. 2d 57 (9th Cir. 1926); *cf. Leonard* v. *U. S.,* 18 F. 2d 208 (6th Cir. 1927) but *cf. U. S.* v. *Weiss,* 293 Fed. 992 (N.D. Ill. 1923); or violations of narcotics laws *Blockburger* v. *U. S.,* 284 U. S. 299 (1932), but *cf. Braden* v. *U. S.,* 270 Fed. 441 (8th Cir. 1920), where it has been held that successive acts under a single general scheme may constitute separate crimes for which separate punishment may be imposed. For in such cases the defendant has a free choice at any time to stop his criminal activity; each new act is the result of a new and distinct criminal impulse. But the defendant who has denied a charge against him cannot stop when the charge is repeated, without either remaining silent or admitting that his previous denials were false. He has no alternative but to continue his denials or recant.

For these reasons, we think that the cases holding that only a single crime of perjury can be committed in denying a single charge, even though this may involve the denial of several elements of that charge, should control, even where the denials are repeated at successive stages of the same investigation or prosecution.

The closest analogy to this situation which we have found in the decisions of this Court is in the cases of *United States* v. *Snow,* 120 U. S. 274 (1887), and *Braverman* v. *United States,* 317 U. S. 49 (1942). In the *Snow* case this Court held that continuous cohabitation with seven alleged "wives" over a period of several years constitutes but one continuous violation of a statute making it a misdemeanor to cohabit with more than one woman in a territory of the United States. Multiple

indictments, convictions and sentences were set aside. In the *Braverman* case it was held that a single conspiracy to commit a number of separate crimes constituted only a single crime of conspiracy.

When we consider the frequency with which honest men differ in their recollection or understanding of the same facts and flatly contradict each other, even under oath, the potential dangers of such an abuse of the perjury statute as that involved in the present maneuver become readily apparent. Hardly a case is submitted to a jury, either in civil or criminal law, in which the jury is not called upon to decide where the truth lies between contradictory sworn statements of the witnesses for the opposing sides. To be sure, the primary purpose of the perjury statute is to prevent witnesses from wilfully committing perjury. But under the procedure now proposed by the government, a prosecutor could pursue an unpopular witness who has been contradicted by two or more witnesses, not once but relentlessly and *ad infinitum*. We respectfully submit that this should not be permitted, and that the appropriate way to prevent it is to hold that only a single violation of the perjury statute is committed by a defendant who denies a charge made against him, regardless of the number of incidental statements or denials he may make in support of his original denial.

The government has invoked this Court's aid in carrying out its scheme as set forth in the motion papers. We assume therefore that the merits of that scheme are before the Court. Because of the importance and novelty of the questions involved, and, because the issues raised by the petition for certiorari are necessarily involved in a consideration of the merits of this procedure, we respectfully request the Court to grant the petition for certiorari and set this motion down for argument together with the issues raised by the petition.

IV

The instant case is appropriate for a confession of error by the United States.

The termination of the litigation over the first indictment by dismissal will, as we have seen, gravely prejudice

the rights of the petitioner. We submit to this Court that the more appropriate method of terminating the litigation over the first indictment would be by a confession of error on the part of the representatives of the United States.

"The public trust reposed in the law enforcement officers of the government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent." *Young* v. *United States,* 315 U. S. 257, 258 (1942). Where the United States has doubt as to the justice of a prosecution it is "manifestly [its] duty to confess error. The public interests and the principles of justice would be satisfied with nothing less. * * *" *Parlton* v. *United States,* 75 F. 2d 772, 773 (D.C.C. 1935). The principles expressed as to the duty of public officials have guided the representatives of the United States where they "believe the interests of justice would be served by" confessions of error. Memorandum of the United States (p. 13) in *Ryles* v. *United States,* 336 U. S. 949 (1949). In pursuance of this policy, the government has confessed error in numerous cases both before and after the issuance of a writ of certiorari.* Indeed, the government has found it in the interests of justice to confess error even after opposing the writ of certiorari when further reflection has demonstrated the propriety for so doing and it is not unlikely that a similar result would occur in this case.**

The government's action in seeking to drop the initial indictment and in reindicting Remington for statements made at the trial which are said to be "not subject to any of the alleged infirmities" raised by the petition for certiorari is the final recognition of its own wrong-doing.

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* See *e.g., Wixman* v. *United States,* 335 U. S. 874 (1948); *Bellaskus* v. *Crossman;* 335 U. S. 840 (1948); *Ryles* v. *United States,* 336 U. S. 949 (1949); *Petti* v. *United States,* 336 U. S. 916 (1949); *Fogel* v. *United States,* 335 U. S. 865 (1948); *Gibson* v. *United States,* 329 U. S. 338 (1946); *Bozza* v. *United States,* 330 U. S. 160 (1947); *Young* v. *United States,* 315 U. S. 257 (1942); *Chang Chow* v. *United States,* 286 U. S. 530 (1932); *Yim Kim Lau* v. *United States,* 286 U. S. 531 (1932); *Bates* v. *United States,* 323 U. S. 15 (1944).

** *Petti* v. *United States, supra; Fogel* v. *United States, supra.*

Earlier, doubts had been indicated even by the offending United States Attorney when he felt it necessary to consult with the Attorney General before proceeding with the trial. The Justice Department's failure to seek to sustain the conviction by review in this Court of the reversal below evidenced increasing doubts. This last action in seeking dismissal so that the government will be able to proceed on a new indictment concededly designed to avoid the fatal defects in the present proceeding shows a belated awareness of those defects. Now that the injustice and error have been recognized, "the public trust reposed in the law enforcement officers of the government" demands a confession of error.

The undoubted reason why the government has chosen the method of dismissing the indictment instead of confessing error is the effect which any confession of error might have upon the reindictment. The government apparently does not believe that the *Williams* case will necessarily support its position if the contentions made by petitioner as to the deprivation of due process of law and the proper application of the perjury rule are finally adjudicated by this Court. Thus, the very reason which prompts the government to seek dismissal instead of confessing error is the very reason why the dismissal should be denied, namely, that any dismissal will prejudice petitioner in the determination of the validity of the second indictment.

The government's motion to dismiss is not an effort to avoid further litigation; the government is not seeking to terminate its litigation with William Remington. On the contrary, by proceeding to dismiss instead of confessing error, the government is attempting a tactical maneuver in order to further its new prosecution of William Remington. Such action is not only prejudicial to the rights of petitioner, but is unbecoming the public trust which reposes in the officials of the United States and which should transcend their interest in any particular prosecution.

CONCLUSION

Petitioner requests this Court, in order to prevent irreparable prejudice to petitioner's rights and a grave miscarriage of justice, (i) to assign the government's motion for full briefing and oral argument pursuant to Rule 7(2) or, (ii) in the alternative, to grant the petition for certiorari and postpone decision on the motion until the argument on the merits.

Respectfully submitted,

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Counsel for Petitioner.

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JOSEPH L. RAUH, JR.,
JOHN K. TABOR,
Of Counsel.

DARK PAGE BLEEDTHRU

APPENDIX A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA *v.* WILLIAM WALTER REMINGTON, *Defendant.*	Indictment C ——

The Grand Jury charges:

1. On or about January 24, 1951, in the Southern District of New York, WILLIAM WALTER REMINGTON, the defendant herein, having duly taken an oath as a witness in a competent tribunal, to wit, the United States District Court for the Southern District of New York, at the trial of a criminal cause entitled, *United States* v. *William Walter Remington,* Indictment C 132-344, that he would testify truly, did lawfully, wilfully, and knowingy, and contrary to said oath, state matters which he did not believe to be true, that is to say:

2. At the time and place aforesaid, the Court and Jury were engaged in the trial of the aforementioned indictment, wherein WILLIAM WALTER REMINGTON, the defendant herein, was charged with having committed perjury when he testified falsely and contrary to an oath before a Grand Jury sitting in and for the Southern District of New York, in denying that he had ever, at any time, been a member of the Communist Party.

3. Whether or not WILLIAM WALTER REMINGTON had ever attended Communist Party meetings was a matter material to said trial.

4. At the time and place aforesaid, WILLIAM WALTER REMINGTON, appearing as a witness under oath, testified

falsely before said Court and Jury with respect to the aforesaid material matter, as follows:

"Q. Have you ever to your knowledge attended Communist Party meetings? A. No."

The aforesaid testimony of WILLIAM WALTER REMINGTON, as he then and there well knew and believed, was untrue (Title 18, Section 1621, United States Code).

COUNT II

The Grand Jury further charges:

1. At the time and place aforesaid, as more fully set forth in paragraphs 1 and 2 of Count I herein, the allegations of which are incorporated herein, the defendant, WILLIAM WALTER REMINGTON, appearing at the aforementioned trial, and being under oath, as aforesaid, testified falsely.

2. Whether or not WILLIAM WALTER REMINGTON ever gave to anyone not entitled thereto information to which he had access by reason of his employment by the United States Government was a matter material to said trial.

3. At the time and place aforesaid, WILLIAM WALTER REMINGTON, appearing as a witness under oath, testified falsely with respect to the aforesaid material matter, as follows:

"Q. Did you ever give Miss Bentley or anyone else any secret classified information or any information to which they were not entitled? A. I definitely did not.

Q. Did you ever give such information to anyone for the purpose of having it sent to Russia? A. No.

Q. Or did you ever give such information to anyone for any other purpose? A. No, I did not."

The aforesaid testimony of WILLIAM WALTER REMINGTON, as he then and there well knew and believed, was untrue in that he gave to Elizabeth T. Bentley material and information obtained by him by reason of his employment by the United States Government, and to which the said Elizabeth

T. Bentley was not entitled (Title 18, Section 1621, U. S. C.).

COUNT III

The Grand Jury further charges:

1. At the time and place aforesaid, as is more fully set forth in paragraphs 1 and 2 of Count I herein, the allegations of which are hereby repeated and realleged herein, WILLIAM WALTER REMINGTON, the defendant herein, appearing at the aforementioned trial as a witness and being under oath as aforesaid, testified falsely.

2. Whether or not WILLIAM WALTER REMINGTON had ever paid Communist Party dues was a matter material to said trial.

3. At the time and place aforesaid, WILLIAM WALTER REMINGTON, appearing as a witness under oath before said Court and Jury, testified falsely with respect to the aforesaid material matter, as follows:

"Q. Have you ever paid Communist Party dues? A. I have not."

The aforesaid testimony of WILLIAM WALTER REMINGTON, as he then and there well knew and believed, was untrue (Title 18, Section 1621, United States Code).

COUNT IV

The Grand Jury further charges:

1. At the time and place aforesaid, as more fully set forth in paragraphs 1 and 2 of Count I, the allegations of which are hereby repeated and realleged herein, WILLIAM WALTER REMINGTON, the defendant herein, appearing at the aforementioned trial and being under oath as aforesaid, testified falsely.

2. Whether or not WILLIAM WALTER REMINGTON had ever asked anyone to join the Communist Party was a matter material to said trial.

3. At the time and place aforesaid, WILLIAM WALTER REMINGTON, appearing as a witness under oath, testified falsely with respect to the aforesaid material matter, as follows:

"Q. Did you ever ask anybody to join the Communist Party, Mr. Remington * * *? A. No, I didn't.
Q. You are sure and you are positive of that? A. Positive."

The aforesaid testimony of WILLIAM WALTER REMINGTON, as he then and there well knew and believed, was untrue (Title 18, Section 1621, United States Code).

COUNT V

The Grand Jury further charges:

1. On or about the 25th day of January, 1951, at the Southern District of New York, WILLIAM WALTER REMINGTON, the defendant herein, having duly taken an oath in a competent tribunal, to wit, the United States District Court for the Southern District of New York, at the trial of a criminal cause entitled, *United States* v. *William Walter Remington,* Indictment C 132-344, that he would testify truly, did unlawfully, wilfully, and knowingly, and contrary to said oath, state matter which he did not believe to be true, that is to say:

2. At the time and place aforesaid, the Court and jury were engaged in the trial of the aforementioned Indictment, wherein WILLIAM WALTER REMINGTON, the defendant herein, was charged with having committed perjury when he testified falsely and contrary to an oath before a Grand Jury sitting in and for the Southern District of New York, in denying that he had ever, at any time, been a member of the Communist Party.

3. Whether or not WILLIAM WALTER REMINGTON had ever been a member of the Young Communist League, associated with it, or aware of its existence at Dartmouth College, was a matter material to said trial.

4. At the time and place aforesaid, WILLIAM WALTER REMINGTON, appearing as a witness, under oath, testified falsely with respect to the aforesaid material matter, as follows:

"Q. Now you have testified here regarding the Young Communist League and your membership in it or knowledge or association with it. A. No.

Q. You have not, you say? A. I have testified about my lack of membership in it, my lack of association with it.

Q. Is it your present testimony that you had no knowledge of the existence of the Young Communist League at Dartmouth until your preparation for your defense in this case? A. I had no knowledge."

The aforesaid testimony of WILLIAM WALTER REMINGTON, as he then and there well knew and believed, was untrue in that he knew of the existence of the Young Communist League at Dartmouth prior to the filing of Indictment No. C 132-344 (Title 18, Section 1621, United States Code).

APPENDIX B

Petition for Certiorari

(Bound separately)

No. 387

FILED
DEC 6 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

WILLIAM WALTER REMINGTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN REPLY TO PETITIONER'S RESPONSE TO THE GOVERNMENT'S MOTION FOR LEAVE TO APPLY TO THE DISTRICT COURT FOR LEAVE TO DISMISS THE INDICTMENT.

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NO. 387

WILLIAM WALTER REMINGTON, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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MEMORANDUM FOR THE UNITED STATES IN REPLY TO PETITIONER'S RESPONSE TO THE GOVERNMENT'S MOTION FOR LEAVE TO APPLY TO THE DISTRICT COURT FOR LEAVE TO DISMISS THE INDICTMENT

Rule 48(a) of the Federal Rules of Criminal Procedure provides:

> The Attorney General or the United States Attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

Petitioner opposes the Government's motion for leave to apply to the District Court for leave to dismiss the indictment on two grounds: first, that under the second sentence of Rule 48(a), the indictment cannot be dismissed without his consent (Response 6-8); and, second, that in any event, in the circumstances of this case, leave to dismiss should be denied (Resp. 8-22).

We think petitioner's response to our motion misconceives the nature of our request and, moreover, that at least his second ground of objection to dismissal is prematurely presented in this Court. The authority under Rule 48(a) to grant or deny leave to dismiss an indictment is vested in the District Court. Cf. Bryan v. United States, 338 U.S. 552, 558-559. The Government is not asking this Court for leave to dismiss the indictment; all we ask is that the Court grant us

leave to apply to the District Court for leave to dismiss it. As explained in our motion (pp. 3-4), we seek such leave of this Court only because the pendency here of the petition for a writ of certiorari "makes it uncertain whether the District Court may grant leave to dismiss while the case is pending in this Court, without leave of this Court." In other words, the only purpose of our motion is to remove a possible jurisdictional obstacle to the otherwise undoubted authority of the District Court to grant leave to dismiss. If the leave we ask here is granted, it will be open to petitioner to make his objections to dismissal when the Government applies to the District Court for leave to dismiss. We shall nevertheless show that his objections are altogether untenable.

I

RULE 48(a) DOES NOT REQUIRE PETITIONER'S CONSENT TO DISMISSAL OF THE INDICTMENT

The second sentence of Rule 48(a) provides that, "Such a dismissal may not be filed during the trial without the consent of the defendant." By its express terms, the Rule requires the defendant's consent to a dismissal only when such dismissal is sought "during the trial." Obviously, this case is not now at that stage. With the reversal of petitioner's conviction, the situation is as though he had never been tried, and the Government, with leave of the District Court, is entitled to dismiss the indictment without petitioner's consent.

Petitioner argues, however, that the present case is within the spirit of the Rule. The second sentence of the Rule was responsive to the Fifth Amendment's prohibition against double jeopardy, as indicated by the cases cited in the Note to the Rule: (Confiscation Cases, 7 Wall. 454, 457; United States v. Shoemaker, 27 Fed. Cases No. 16279 (C.C. Ill.)). Of course, once the "trial" has commenced (whether by empanelling the jury or by hearing evidence need not be determined here), the defendant has been placed in jeopardy; and the

indictment cannot be dismissed without barring a second prosecution for the same offense, unless the dismissal (or nolle prosequi) is had with the consent of the defendant. That is what United States v. Shoemaker holds. But the same cases which are cited in the Note to Rule 48(a), supra, for the proposition that this sentence of the rule is declaratory of existing law, also reiterated the right of the Government to dismiss an indictment prior to the commencement of the trial.[1/]

Nothing is better established than that the retrial of a defendant who secures a reversal of his conviction does not subject him to double jeopardy. Indeed, as recently as Bryan v. United States, 338 U.S. 552, this Court specifically held that even where a defendant obtained a reversal of his conviction "because the evidence is not sufficient to obtain a conviction," the double jeopardy rule did not require the appellate court to direct the entry of a judgment of acquittal.

Thus, by his successful appeal, petitioner lost the rights relating to double jeopardy which he acquired when his trial commenced. Trono v. United States, 199 U.S. 521, 533; United States v. Ball, 163 U.S. 662, 671. He may now be tried again under the first indictment, just as though the first trial had not taken place. For the same reason, the Government has the same right to refrain from a retrial of

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1/ This right was modified in the first sentence of Rule 48(a) to require leave of the court.

petitioner without his consent as it had to refrain from bringing him to trial the first time. Since the sole purpose of the second sentence of Rule 48(a) is to protect a defendant against dismissal of the indictment and a possible second prosecution after he has been placed in jeopardy by the commencement of the trial, his consent to such dismissal is no longer required when that jeopardy is wiped out by his successful appeal. In other words, petitioner's consent to the dismissal of the indictment is not now required by the Rule, just as it was not required before he was placed in jeopardy at the trial.

Thus the language, history and purpose all combine to show that the Rule is inapplicable in the present situation.

II

PETITIONER HAS INTERPOSED NO VALID OBJECTION TO THE GOVERNMENT'S MOTION

Petitioner contends that the Government should not be permitted to dismiss the first indictment, because such dismissal "will gravely prejudice petitioner's rights" (Resp. 8). We submit that petitioner has no rights which will be prejudiced by such dismissal.

First, petitioner asserts that dismissal will deprive him of an opportunity to try to persuade this Court that the indictment was rendered invalid by the allegedly illegal actions of the United States Attorney before the grand jury (Resp. 11-13). The most that petitioner could hope to accomplish by such a showing would be dismissal of the indictment. If the indictment is dismissed, as we propose, petitioner's only legitimate objective on this score will have been accomplished.

Petitioner further argues that because of such alleged infirmities in the original indictment the entire trial was a deprivation of due process of law and, consequently, statements made at the trial cannot form the basis of a perjury prosecution (Resp. 12). This Court disposed of a similar contention in United States v. Williams, 341 U.S. 58, 67-68, as follows:

> * * * where the court in the trial where the alleged perjury occurred had jurisdiction to render judgment on the merits in those proceedings, defects developed dehors the record or in the procedure, sufficient to invalidate any judgment on review, do not make a subsequent conviction for perjury in the former trial impossible.
>
> * * *
>
> Where a federal court has power, as here, to proceed to a determination on the merits, that is jurisdiction of the proceedings. The District Court has such jurisdiction. Though the trial court or an appellate court may conclude that the statute is wholly unconstitutional, or that the facts stated in the indictment do not constitute a crime or are not proven, it has proceeded with jurisdiction and false testimony before it under oath is perjury.

There is no contention that the trial court did not have jurisdiction to proceed to a determination on the merits. Accordingly, petitioner can be prosecuted for testifying falsely during the trial (341 U.S. at 65-69), irrespective of the validity of the prior indictment.

Petitioner also contends that dismissal of the indictment will preclude him from obtaining from this Court an adjudication that he is entitled to a judgment of acquittal. Clearly, a reversal by this Court on grounds of insufficiency or invalidity of the indictment would not produce a judgment of acquittal, but merely a dismissal of the indictment. Nor would reversal on the ground that the court below misconstrued the perjury rule of evidence result in a judgment of acquittal. The Government would still be entitled to an opportunity to prove by more direct evidence that petitioner had joined the Communist Party; the claimed deficiency in the proof upon that theory is one that, by its very nature, is curable upon a new trial. The Court of Appeals has already so held in finding that the trial court misapplied the perjury rule, and Bryan v. United States, 338 U.S. 552, 560, makes it clear that the remand by the Court of Appeals permitting a new trial was a "just and appropriate order which the Court of Appeals was authorized to enter by 28 U.S.C. 2106." If it be assumed that this Court should accept petitioner's theory as to the precise nature of the error in the trial court, rather than that of the court below, the appropriate disposition would still be a remand permitting a new trial; and the Government would still be entitled to a chance to retry the case if it could meet the evidentiary requirements.

The core of petitioner's argument is that, in the circumstances of this case, a judgment of acquittal under the first indictment might preclude his conviction under the second indictment for perjury committed during his trial under the first, and therefore that he might escape the burden of a second trial. If, as we shall show, a judgment of acquittal could not have that effect, then petitioner has failed to make any showing that he will be prejudiced if the Government is allowed to dismiss the first indictment.

Again, United States v. Williams, 341 U.S. 58, is controlling. There, this Court held that an acquittal of defendants on a charge of aiding and abetting the beating of prisoners for the purpose of securing confessions did not bar a prosecution of those defendants for perjury in testifying that they did not see the beating. For "An acquittal of such a crime or of aiding and abetting was certainly not a determination that Ford, Bombaci or Yuhas did not see Williams assaulting the prisoners" (341 U.S. at 65). Thus, even if petitioner were acquitted of the charge of perjury in having testified before the grand jury that he had never been a member of the Communist Party, such acquittal would not bar his prosecution for committing perjury at his trial in testifying that he had not attended Communist Party meetings, paid Party dues, or asked others to join the Party, that he had not been a member of, or associated with, or aware of the existence of, the Young Communist League at Dartmouth College, and that he had not given anyone not entitled thereto information to which he had access as a government employee.

Here, as in United States v. Williams, supra, even if petitioner were acquitted under the first indictment, his trial under the second indictment would not constitute double jeopardy, since "It is only an identity of offenses which is fatal." Pinkerton v. United States, 328 U.S. 640, 644. As this Court stated in Williams (at p. 62):

> It would be no service to the administration of justice to enlarge the conception of former jeopardy to afford a defendant immunity from prosecution for perjury while giving testimony in his own defense.

As in Williams, the question here is whether, under res judicata principles, an acquittal on the first indictment would constitute "a determination favorable to petitioner of the facts essential to conviction" under the second perjury indictment.

Acquittal on the first indictment would constitute a determination that petitioner had not falsely testified before the grand jury in stating that he had never been a member of the Communist Party. We may assume that such an acquittal would be res judicata, for example, as to a subsequent charge that petitioner had falsely denied that he was an official of the Communist Party. Assuming that only members may be officers of the Party, it could be argued that a determination that one has truthfully denied membership precludes a contention that one has falsely denied being an officer. Cf. Sealfon v. United States, 332 U.S. 575, 578-580. However, such an acquittal could not be conclusive as to any statement of fact which ~~was not an essential element of, or~~ did not include as an essential element, the statement of fact the truth of which was determined by the judgment of acquittal.

Here, no one of the false statements charged in the second indictment, with the possible exception of that relating to payment of Party dues, could be regarded as having been determined favorably to the petitioner by an acquittal on the earlier charge that he had falsely denied membership in the Communist Party. For example, such an acquittal is not a determination that petitioner never knowingly attended Communist Party meetings. Clearly, attendance at Communist Party meetings is no more precluded by non-membership in the Party than observing a beating is precluded by a determination that the

observer did not aid and abet the beating. One might attend meetings for curiosity's sake, or to gain information, or on the invitation of a friend. Similarly, petitioner could have had knowledge of the existence of the Young Communist League at Dartmouth College, or even have associated with it, without having been a member of the Party. And he could have given away secret information for many reasons (e.g., for money) unrelated to membership in the Communist Party. The Williams case thus thoroughly disposes of petitioner's contention that an acquittal on the original charge would bar his prosecution under the new indictment.

Petitioner seeks to distinguish United States v. Williams, supra, upon the ground, unsupported by any authority, that one cannot be indicted for perjury committed during a trial on charges of perjury (Resp. 16). We think it clear that a defendant does not have a "right" to commit perjury during his trial on charges of perjury, any more than he may commit perjury with impunity during his trial on any other charge. Petitioner conjures up limitless possibilities of perjury prosecutions based upon repeated denials of charges of perjury. But of course, a defendant does not have to commit perjury in giving testimony in his own defense. Petitioner, in effect, makes the startling assertion that he does, for he says that "as often as the charge is repeated, if he has the hardihood to defend himself, he must repeat this denial, and of course that means also that he must also deny the details of the charge; otherwise he must admit it" (Resp. 21). But those involved in the Williams case were in exactly the same position as petitioner, for certainly it was as necessary to their defense against a charge of abetting a beating to deny that they saw the beating, as it was for petitioner to deny the facts involved in the second indictment.

The perjury statute presents no greater opportunity for unfounded prosecutions than do most criminal statutes. And the

possibility that a second perjury prosecution may sometimes result from a perjury trial is no good reason for encouraging wholesale perjury in perjury cases.

Petitioner contends that not "more than a single crime of perjury can be predicated on statements under oath relating to a single subject, made during the course of a single continuous investigation" (Resp. 17-22). Petitioner would apply this bald statement by assuming that the instances of perjury charged in the second indictment relate solely to the issue of his alleged membership in the Communist Party, denial of which was the basis of the first indictment; he also asserts that during the grand jury proceedings leading to the first indictment, he was asked substantially the same questions and gave substantially the same answers as are set forth in the second indictment as perjuries committed during the trial under the first. He concludes, therefore, that the alleged rule should preclude more than a single prosecution based upon the matters as to which he was questioned before the grand jury or during the subsequent trial.

As petitioner admits, his cited authorities "relate to proceedings at a single hearing, or at a single trial" (Resp. 19). Indeed, such of the cited cases as State v. Shannon, 136 Me. 127, 902, and Black v. State, 13 Ga. App. 541, 79 S.E. 173, 174, emphasize that it is the identity of the proceeding and of the oath taken by the defendant that constitutes as a single offense of perjury all of the falsehoods uttered by him. The allegedly perjurious statements set forth in the second indictment are, as we have shown, different from the one on which the first indictment was founded, and were made in separate proceedings under separate oaths. The charges made in the second indictment could not have been contained in the first, for the offenses alleged in the second had not been committed when the first one was returned. Petitioner's contention that all his statements constitute only one offense would have the effect of granting a witness charged with having once sworn falsely immunity from any further prosecution for later false testimony.

Petitioner's argument that he cannot be indicted for alleged perjuries committed during his trial because the same alleged perjuries were also committed before the grand jury, would have curious consequences. It would mean that one tried on a charge of perjury before a Congressional committee would be immune from prosecution for repeating the same or related perjuries at his trial. Such anomalous results only emphasize that perjury prosecutions are independent of the proceedings out of which they arise. Thus, as in the present case, it is irrelevant that there was a relationship between two proceedings in each of which perjury is alleged to have occurred. Rather, each perjury prosecution is a separate vindication of the "probable wrong done the administration of justice by false testimony." United States v. Williams, 341 U.S. at 68.

Moreover, whatever may be the rule in some states, it is clear that in the federal courts separate allegedly false statements even under the same oath may be charged as separate counts in an indictment for perjury. Seymour v. United States, 77 F. 2d 577 (C.A. 8); United States v. Cason, 39 F. Supp. 731, 734 (W.D. La.).

Finally, we suggest that even if petitioner had been or were to be acquitted under the first indictment, the whole question whether or to what extent such an acquittal would be res judicata as to the issues presented by the second indictment is raised prematurely at this time. Petitioner is in effect seeking a declaratory judgment, heretofore unknown to the criminal law, that under the doctrine of res judicata an acquittal on the first indictment would preclude his conviction under the second. The question is premature, in that the essentially factual issues of res judicata can be elucidated on motion or trial proceedings under the second indictment, and in that petitioner may be acquitted or may obtain dismissal with respect to some or all of the counts. Prematureness is emphasized by the fact that if the courts below had acquitted petitioner under the first

indictment, he could not evoke from federal appellate courts a ruling as to the res judicata effect of such acquittal upon a later indictment unless and until he was convicted thereunder. For a denial by the district court of a motion to dismiss the second indictment upon that ground would not be an appealable order.

No public interest and no genuine interest of petitioner will be served by continuing the present proceedings. He will have to undergo the burden of a trial on the new indictment whether the first indictment is dismissed voluntarily by the Government or on the merits by order of this Court, or whether this Court directs an acquittal. We therefore respectfully submit that the Government's motion for leave to apply to the District Court for leave to dismiss the indictment should be granted.

PHILIP B. PERLMAN,
Solicitor General.

DECEMBER 1951.

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982412—52——1

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 387

WILLIAM WALTER REMINGTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is reported at 191 F. 2d 246.

JURISDICTION

The judgment of the Court of Appeals was entered on August 22, 1951. On September 20, Mr. Justice Jackson extended the time for filing a petition for a writ of certiorari to October 20, 1951. The petition was filed October 19, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

DARK PAGE BLEEDTHRU

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly left for further hearing and determination in the District Court the issue of whether the alleged interest of the foreman of the grand jury in the prosecution so tainted the action of the grand jury as a whole as to invalidate the indictment.

2. Whether the indictment was sufficient to charge an offense.

3. Whether proof of acts consistent only with membership in the Communist Party is direct evidence sufficient to sustain a conviction for perjury based on denial of such membership.

4. Whether in a prosecution for perjury it is sufficient to prove that the defendant did not believe the statements to which he swore.

STATUTE AND RULE INVOLVED

18 U. S. C. 1621 provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000

or imprisoned not more than five years, or both.

Rule 6 (b) (2) of the Federal Rules of Criminal Procedure provides:

> A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

STATEMENT

Petitioner was indicted for perjury in the United States District Court for the Southern District of New York, in that, when testifying under oath before a grand jury in that district, he stated that he had never been a member of the Communist Party, testimony which he then well knew and believed to be untrue (Tr. XVIII–XIX).[1]

The giving of the testimony is admitted and its materiality is not substantially controverted. The chief issue at the trial was whether petitioner

[1] References are to the typewritten transcript on file in this cause.

"well knew and believed" his answer as to membership in the Communist Party to be false. On that issue the salient evidence for the Government may be summarized as follows.

In the fall of 1936, petitioner secured a leave of absence from Dartmouth College and obtained employment as a messenger for the Tennessee Valley Authority at Knoxville, Tennessee (Tr. 2429–2430, 2390). In the middle of June 1937, one McConnell, who used the name Ken Malcombre, was assigned to Knoxville as a full-time organizer for the Communist Party (Tr. 580–583). He testified that shortly after his arrival in Knoxville, he called a meeting of the Communist Party there, to be held at night in a park, to discuss the shortcomings and problems of the local Party. Petitioner attended and suggested the publishing of a leaflet to indicate activity. (Tr. 586–587.) Subsequently, at a meeting of the Workers Alliance, an organization of unemployed and WPA workers, petitioner pointed out to McConnell persons whom he considered to be potential recruits for the Party (Tr. 589–591). McConnell testified that his relationships with petitioner were all as "fellow members of the Communist Party" (Tr. 684–685).

McConnell's former wife, known as Betty Malcolm, obtained employment with the Tennessee Valley Authority (Tr. 584, 684). She presided at meetings, held at her house, of a unit of the Communist Party composed of members employed by

the Tennessee Valley Authority (Tr. 465–466, 571). Four to six persons usually attended such meetings (Tr. 468, 705). Two different witnesses testified that petitioner was one of those in attendance at such Communist Party unit meetings (Tr. 468–469, 692–693). The meetings were concerned with liberal and labor activities in the community, methods of enlarging Party membership, and the desirability of holding an open meeting of the Communist Party (Tr. 468, 693). Petitioner took an active and vigorous part in the discussions (Tr. 694).

In the spring of 1937, petitioner endeavored to persuade a TVA employee, who had been active in a group known as the Workers Education Committee, to join the Communist Party (Tr. 3413–3414, 3416–3417).[2]

The official post office box of the Communist Party in Knoxville was Post Office Box No.

[2] Martin, a witness for the defense, who knew petitioner at Knoxville (Tr. 2212), admitted that, in 1941, in a sworn statement to the Civil Service Commission (Tr. 2231–2232) he had stated, when asked about his association with petitioner (Tr. 2238)—

"I won't deny that he was a Communist as that was well known, because he approached everyone and asked them to join the Communist Party" (Tr. 2239). The witness testified that he thought the statement "substantially correct," but the language "loose" since he did not know whether petitioner was a Communist. He stated that he had no present recollection that petitioner approached anyone to join the Party, although he did "not deny" that he may have "recalled at that time some incident of that sort." Tr. 2244–2245.)

1692 (Tr. 843–844, 850). The Party had a strict rule that only Party members were to use such boxes (Tr. 924). While in Knoxville, petitioner received at this box the official publication of the Communist Party for the South (Tr. 839–840). When he left Knoxville, he had his subscription transferred (Tr. 841).

In the fall of 1937, petitioner returned to Dartmouth as a junior (Tr. 2496). At a peace meeting there he met Ann Moos, whom he later married in his senior year (Tr. 180). Before his engagement, petitioner described his activities in Knoxville and, after binding Miss Moos to secrecy, told her that he had been a member of the Communist Party down there (Tr. 184). Before his wife married him, he promised her that he would continue to be a Communist (Tr. 202). A fellow student at Dartmouth testified that petitioner told him "that he was a member of the Communist Party because his father had always been a stooge for capitalists" (Tr. 1432).[3]

In 1939, petitioner and his wife lived in New York where petitioner was doing graduate work in economics at Columbia University (Tr. 2513). They met and became friendly with Joe North, a writer for and subsequently editor of the New

[3] There was testimony that at Dartmouth petitioner was active in the Young Communist League (Tr. 186, 983), but the judge ruled that such testimony was not probative on the issue of petitioner's membership in the Communist Party (Tr. 4017).

Masses (Tr. 194, 207, 216). They did not attend Party meetings in this period, but they did solicit votes for Earl Browder and contributed money to the New Masses (Tr. 215–217, 313).

In the spring of 1940, petitioner entered the Government service in Washington (Tr. 2538–2539). At first he worked for the National Resources Planning Board, later for the Office of Price Administration, and after February 1942, for the War Production Board (Tr. 2547). Petitioner and his wife saw Joe North fairly regularly and gave him information that they thought might be useful (Tr. 229–230). They paid Party dues to him sporadically (Tr. 396, 409–411).

In November 1941, petitioner and his wife moved to Alexandria, Va. (Tr. 228). They mentioned to Joe North that they felt out of touch with Party work and wanted to do more without joining a local group (Tr. 228–229, 384). They were finding it difficult to make contact with North, who did not come to Washington frequently (Tr. 230–231). North said that he would discuss the matter with Party headquarters and see if he could arrange another contact (Tr. 231).

Early in 1942, North introduced petitioner and his wife to "John" (Tr. 231–232), who was in fact Jacob Golos, a top official of the Communist Party underground (Tr. 233, 1052–1054, 1056). Subsequently, John introduced the Remingtons to "Helen", who was in fact Elizabeth Bentley

(Tr. 235–236, 1060). The Remingtons were told that Helen would be in Washington at approximately two-week intervals to receive any information they had for her, and would bring them Communist Party literature. They were also told to pay Party dues to her. (Tr. 237, 388, 1063–1064.)

In accordance with these arrangements, Miss Bentley came to Washington from time to time and had a number of meetings with petitioner from 1942 to 1944, at some of which petitioner's wife was also present. These meetings took place in petitioner's car, on park benches, in luncheonettes, and other unobtrusive places. (Tr. 239–243, 245, 1066–1069.)

Petitioner delivered to Miss Bentley various items of information which he obtained through his work, including statistics as to airplane production, allocation of planes to the several theatres of war and estimates of their performance in battle (Tr. 1073–1075). At one time when petitioner's wife was present, he gave Miss Bentley information that he said was very important and top secret (Tr. 243, 1077). This was a formula for the conversion of garbage to gasoline or rubber (Tr. 243, 1077–1078), which was at one time seriously considered but which subsequently proved unfeasible (Tr. 3274, 3282). Remington also told Miss Bentley that one Redmont, whom he knew to be a Communist Party member,

needed a contact and asked whether she would take him on (Tr. 1081). Later Remington introduced Redmont to Miss Bentley and Golos (Tr. 1082–1083).

At petitioner's first meeting with Miss Bentley in Washington, petitioner's wife was present, and gave him $20 which he, in turn, gave to Miss Bentley as dues (Tr. 241, 395). This procedure was repeated on other occasions when petitioner's wife accompanied him to his meetings with Miss Bentley (Tr. 242–243, 397, 1070). The wife testified that she was very anxious to pay dues because she felt that such payment was an indication that they were bona fide members of the Party (Tr. 389–391).

Miss Bentley testified that petitioner also paid dues to her when his wife was not present (Tr. 1239). She brought down the schedule of rates and left it to the individual to calculate his own dues (Tr. 242, 1071, 1239). After dues had been paid, Miss Bentley would, at a later meeting, deliver a receipt for the money which had been prepared at Communist Party headquarters (Tr. 1072, 1241, 1248). The receipts were made out "to a friend" and initialed illegibly (Tr. 1241). Miss Bentley testified that persons doing underground work were never given Party membership books (Tr. 1087).[4]

[4] The evidence with respect to the relationship between Miss Bentley and grand juror Brunini is summarized in Point I, *infra*.

Petitioner was found guilty (Tr. 4027) and sentenced to imprisonment for five years and to pay a fine of $2,000 (Tr. 4041).

On appeal, the Court of Appeals for the Second Circuit reversed the conviction and remanded the cause because of various trial errors, including the failure of the trial judge, in his charge to the jury, adequately to define membership in the Communist Party, or to point out to the jury the type of overt acts which would show that petitioner believed himself to be a member. 191 F. 2d 246.

ARGUMENT

Petitioner seeks review here of a judgment reversing his conviction. Manifestly, consideration of the issues raised in the petition is warranted only if he can show that he is entitled to greater relief than he already has been given under the judgment below. He therefore seeks *either* a direction of a judgment of acquittal or dismissal of the indictment. We submit that he has shown no grounds for such relief.

I

Petitioner's contention that the indictment should be dismissed because the foreman of the grand jury, Brunini, allegedly had a financial interest in the book Miss Bentley was to publish and that such financial interest would be furthered by petitioner's conviction, with the result that he improperly influenced the grand jury to return the indictment (Pet. 9–27), does not

present a matter which is ripe for review by this Court at this time. The Court of Appeals did not reject petitioner's theory on this point, but gave petitioner an opportunity to prove his assertions by according him access to the grand jury minutes of his own testimony, which would seem to be the portion of the grand jury proceedings principally involved. The Court of Appeals stated that "The indictment should not be quashed unless undue influence is shown," and that "Since we have already held that the accused must be given access to the minutes of his own testimony before the grand jury, it will appear upon inspection whether Brunini [the foreman] abused his powers, at least in that part of the proceedings" (Pet. xiii).[5]

Rule 6 (b) (2) of the Federal Rules of Criminal Procedure, *supra*, p. 3, specifically provides that the disqualification of one member shall not result in dismissal of an indictment if twelve qualified jurors voted for the indictment. This seems clearly to mean that the mere presence of an interested person on a grand jury will not vitiate the indictment, so long as it is voted by the required number of disinterested persons. *United States ex rel. McCann* v. *Thompson*, 144 F. 2d 604, 606 (C. A. 2), certiorari denied, 323 U. S. 790 (five allegedly interested jurors among

[5] The court's reference was to its previous holding (*id.*) that the trial court erred in denying petitioner's motion to inspect the minutes of his testimony before the grand jury.

seventeen returning indictment). Under this Rule, Brunini's collaboration with Miss Bentley on her book (which is not denied)[6] or his financial interest in it (as to which the testimony was in conflict) might have disqualified him, but would not have invalidated the indictment.

The court below concluded, however, and we do not challenge its ruling, that if it could be shown that the foreman so influenced the other jurors that the whole jury could be said to be tainted, the indictment would have to be dismissed. Thus, the court below did not hold that the indictment would be valid despite the allegations as to Brunini's conduct. It held merely that the matter should be determined if there was to be a retrial—and petitioner cannot be convicted under this indictment unless there is a retrial—upon the basis of a more complete exploration of the facts. This obviously is the kind of question—whether further evidence should be taken—upon which this Court will not ordinarily reverse, or review, the exercise of discretion by a lower court.

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[6] It has been held that the fact that a grand juror had individual knowledge of a case, or even that he was a complainant, would not disqualify him. *Commonwealth* v. *Woodward*, 157 Mass. 516 (1893); *United States* v. *Williams*, 1 Dill. 485, Fed. Cas. No. 16,716 (C. C. D. Minn., 1871); *United States* v. *Belvin*, 46 Fed. 381 (C. C. E. D. Va., 1891). But even assuming individual disqualification, it follows *a fortiori* that the presence of such a juror does not invalidate the action of the grand jury as a whole, as was held in the *Thompson* case, *supra*.

In this case it was not an abuse of discretion for the Court of Appeals, in setting aside the conviction, to have concluded that the taking of additional testimony on this question would be appropriate if the case were to be retried. For not only was there a conflict in the testimony as to whether Brunini had a financial interest; there was nothing in the record at all to show he had influenced the other grand jurors.

First, there is the issue as to whether Brunini did have a financial interest in the book. At the trial, the defense cross-examined Miss Bentley, who testified that Brunini had given her moral and editorial support but denied that he had any financial interest in the book (Tr. 1377–1380). The defense then called two former employees of the publisher who testified that an earlier agreement with the publisher under which Brunini was to be Miss Bentley's literary assistant and receive part of the proceeds had been prepared (Tr. 1598–1600; 1537–1546). They did not know whether this earlier contract had been signed (Tr. 1546, 1610). Certainly an appellate tribunal cannot determine upon the basis of this possibly conflicting testimony that Brunini did have a financial interest. Brunini was not called upon to testify, nor were the publishers, although two of them were in the courtroom, one under subpoena by petitioner (Tr. 1585–1587); the burden was upon petitioner to establish his point,

and his failure to call available witnesses who would have direct knowledge is significant. More extensive hearings and findings to determine this initial question are certainly appropriate, if not necessary, to establishment of the premise of petitioner's position.

And even if a financial interest in the book can be shown, there would still be a question as to whether this would give Brunini such a financial interest in the prosecution of petitioner as to constitute a disqualification of his right to act as a juror. Manifestly, that is a matter which requires further examination and determination.

And then there would still remain the ultimate question of whether any taint that might possibly be found as to Brunini extended to the other grand jurors. There was no evidence as to this at all. It cannot be assumed without proof that one grand juror improperly influenced the others voting for the indictment.[7] This subject even more clearly requires further exploration. Petitioner asserts that he was prevented by the District Court from ascertaining what went on inside the grand jury room. But certainly the failure of petitioner to prove his claim, even for

[7] The United States Attorney asserted that there were 22 jurors who voted for the indictment (Tr. 1405, 2664); defendant objected to this statement on the ground that the grand jury records had not been disclosed. This subject is obviously one which should be explored more fully in order to determine whether 12 qualified and uninfluenced jurors had voted for the indictment.

such an excusable reason, would not warrant dismissal of the indictment; he would at most be entitled to a fresh hearing on the question. Thus, even if it be assumed that petitioner was improperly barred by the District Court from inquiring into facts needed to support his allegations and his affidavit, this would not prove error in the Court of Appeals, which set aside the District Court's decision, opened up the closed sources in an important respect, and gave petitioner a chance to prove his claim.

All these matters could be fully heard and determined in the District Court if there were to be a new trial on the instant indictment. The court below certainly cannot be said to have acted improperly in not deciding the question in favor of petitioner on the basis of the present record, but in permitting the matter to be explored more fully on any retrial that might be held. We submit that it would be just as inappropriate for this Court to attempt to decide these questions on the basis of the present record.

Petitioner's aspersions on the attorneys who prosecuted the case for the Government are wholly unwarranted. Mr. Donegan, who assisted in presenting the case before the grand jury, stated to the court that Miss Bentley, whom he had not previously met, came to him as a client when he was engaged in private practice. As soon as it appeared that he might be asked to return to Government service as a special prose-

cutor, he told her that he wished to be relieved because of the possibility that she might be called as a witness, and he informed the grand jury of his former representation of Miss Bentley. (Tr. 1390–1391; 1521–1524.) Such conduct, which was in no way improper, certainly cannot affect the validity of the indictment.

Petitioner asserts that Government counsel acted improperly in not apprising him of their knowledge of the Brunini episode, and complains that this knowledge extended to the alleged financial relationship. But petitioner cannot impute to Government counsel knowledge of a fact not proved to be true. The fact that the episode may have been discussed in Department of Justice files, with the Attorney General, or with other judges, does not establish the truth of petitioner's allegations, and certainly does not establish that there was also an obligation to disclose anything to the adverse party. In view of the charge of impropriety, not supported in the record, we think it proper to state that the United States Attorney's office has advised us that on the basis of its inquiries, it remains of the opinion that at no time did Brunini have a financial interest in the book.[8] At most, Government counsel

[8] Since petitioner is of a contrary opinion and since the record furnishes no conclusive answer, we do not assert this to be a fact. But the difference of opinion and the conflict in the testimony shows how reasonable it was for the court below not to have determined the matter on the basis of the present record but to have left it open for a new hearing on conditions more favorable to petitioner.

learned some weeks after the indictment—and not before—that Brunini had collaborated with Bentley on her book. Since this would at most have disqualified him, without affecting the indictment voted by more than 12 other grand jurors, it would not have invalidated the indictment or in any other relevant manner have affected the case. It was thus in no way improper for the United States Attorney not to have disclosed the information to defense counsel or to the trial court.

II

A. Petitioner's challenge to the sufficiency of the indictment to state an offense (Pet. 28–31) is without merit. The indictment alleged clearly and definitely that petitioner had, at a certain time and place, in answer to a material question, sworn that he had never been a member of the Communist Party, a statement which he well knew and believed to be untrue. Manifestly, petitioner was informed of the offense for which he was to be tried and, if acquitted, could not again be tried for making that same statement at the same time and place. The indictment therefore meets the tests by which its validity must be judged; it informs petitioner of the nature of the offense and bars future prosecution for the same charge. *Glasser* v. *United States,* 315 U. S. 60, 66; *Hagner* v. *United States,* 285 U. S. 427, 431; *Bersio* v. *United States,* 124 F. 2d

310, 314 (C. A. 4), certiorari denied, 316 U. S. 665; *United States* v. *Goldsmith,* 108 F. 2d 917, 920–921 (C. A. 2), certiorari denied, 309 U. S. 678.

All that the decision below held was that, in view of the manner in which the Government would presumably undertake to prove its case on a new trial, petitioner should be given a bill of particulars specifying the acts on which the Government intended to rely as proof of belief in membership. But it does not follow from that ruling that the indictment failed to inform petitioner of the offense for which he was to be tried. The court was merely extending to petitioner the advantage of requiring the Government to specify its evidence in advance.

Petitioner did not claim that at the time he denied membership before the grand jury or at the trial he did not know what was meant by the question. It may be that he did not know the kind of evidence upon which the Government would rely to prove the falsity of his oath, but lack of such knowledge is clearly very different from lack of knowledge as to the offense charged.

III

In urging that he is entitled to a judgment of acquittal, petitioner argues (Pet. 31–39) that the failure by the court below to direct the entry of such a judgment stems from its concept of the crime of perjury as embracing lack of belief in the statements on which the indictment is

founded, and that, if that concept is held to be erroneous, a judgment of acquittal must necessarily follow. This stems from his theory that the rule requiring "direct" evidence of at least one witness in perjury cases can, if the issue be objective falsity, be satisfied in this case only by proof of the initial act of joining.

We submit, however, that whether the issue to be proved is that petitioner was a member or that he believed himself to be a member of the Communist Party, proof of conduct consistent only with membership—although not of the act of joining—is direct proof sufficient to satisfy the perjury rule. For direct testimony is testimony which in and of itself has a rationally direct and compelling tendency to establish the facts to be proved. The evidence in this case was clearly sufficient on any theory to warrant submission of the case to the jury and thus to preclude the judgment of acquittal which petitioner seeks. The case, therefore, is not one in which this Court need decide the question raised by petitioner.

The Government proved, by more than two witnesses, that petitioner attended closed Communist Party meetings and participated therein on an equality with other members in discussion of Communist Party affairs. This is as much direct evidence, both of membership and belief in membership, as the act of filling out an application form.

Mere attendance at one or two meetings conceivably might not be considered sufficiently direct since conceivably an outsider might be allowed to attend a closed meeting. But repeated presence at meetings limited to members and participation therein as a member is clearly action evincing membership and therefore the direct evidence needed to satisfy the perjury rule. Cf. *Berwick's Case,* Foster, *Crown Law,* p. 10, 18 How. St. Trials 367 (1746), where testimony that, after a rebel garrison had surrendered, the defendant appeared in the prison set aside for officers and gave his rank, was held to be, not a mere confession after the fact, but an act constituting direct evidence of treason. (See subsequent comment thereon, Foster, *Crown Law,* pp. 243–244.)

Similarly, petitioner's use of a Party mail box which was restricted to Party members was direct evidence of the status of membership.

So also, payment of dues is an act directly and compellingly evincing membership and recognition of membership. There were two witnesses to such payments, petitioner's ex-wife and Miss Bentley. And petitioner's ex-wife made it clear in her testimony that this act of payment was deemed by her and by petitioner a method of evincing membership in the Party and establishing the status of membership (see Statement, *supra,* p. 20). Petitioner asks this Court to rule, as a matter of law (Pet. 44–45), that the only

type of payment which proves membership is that which is evidenced by pasting stamps in a dues book, despite testimony at the trial that such method was not used in the case of all members (Tr. 1087). As a matter of fact, so far from it being common knowledge, as petitioner claims, that Communist Party dues were paid only by the method he suggests, this Court presently has before it a record in which an alien, ordered deported for former membership in the Party, admitted payment of dues in substantially the manner in which it was proved dues were collected from petitioner. (See *Coleman* v. *McGrath,* No. 264, this Term, Transcript 39–40.)

We see no necessity for going further into the proof. It is clear that, quite aside from the principle that an appellate court will not direct the entry of a judgment of acquittal even where it finds a deficiency in the evidence (*Bryan* v. *United States,* 338 U. S. 552), there is no possible basis for such a direction here since, on any theory, the Government proved its case by more than the minimum quantum of evidence required to establish perjury.

Under these circumstances the questions raised by the petition as to the interpretation given to the perjury statute by the court below have no immediate significance. The authorities, cited by the court below, make it clear that perjury may

be established by proving that a witness made a material statement under oath which he did not believe to be true.[9] That is what the statute (18 U. S. C. 1621) in terms proscribes. It is also true, as petitioner argues, that most perjury cases have been tried on the theory that a witness' knowledge of the falsity of his oath can best be proved by proving that the facts to which he swore are untrue.[10] The difference is actually more of phraseology than reality, for evidence which is sufficiently compelling to show that a witness believed a statement to be false is the same kind of evidence which will normally prove its falsity. For example, in *People* v. *McKinney*, 3 Park Crim. Rep. (N. Y.) 510 (1857), the defendant had testified that he heard two others make a bargain. The terms of the bargain as he described them were true, but the defendant was not present when the bargain was made. Despite the fact that he could obviously have

[9] Hawkins, *Pleas of Crown* (6th edition, 1777), Bk. I, Ch. 69, Sec. 6, pp. 322–333; *Regina* v. *Schlesinger*, 10 Q. B. 670, 2 Cox, Cr. Cases 200 (1847); *State* v. *Gates*, 17 N. H. 373 (1845); *People* v. *McKinney*, 3 Park. Crim. Rep. (N. Y.) 510, 515 (1857); *State* v. *Cruikshank*, 6 Blackford (Ind.) 62 (1841); *Commonwealth* v. *Miles*, 140 Ky. 577 (1910).

[10] See in this connection the British codification of the common law in the Perjury Act of 1911 (1 & 2 George V, c. 6), in which perjury is defined as the making of a material statement under oath which the witness "knows to be false or does not believe to be true," (Sec. 1) and which requires that no conviction be had "upon the evidence of one witness as to the falsity of any statement alleged to be false" (Sec. 13).

been tried for making the false statement that he was at the particular place, the case was submitted to the jury on the theory that he should be convicted if he did not believe that to which he swore. The evidence that proved the falsity of part of his statement proved his lack of belief. So when a man testifies that an article is of a certain value, it is possible to show his lack of belief by showing that he had never examined the article or received information about it, *i. e.*, by his objective actions.

Here, as we have shown, on either theory, the evidence in this case is sufficient, and petitioner is not entitled to a direction for entry of a judgment of acquittal. In view of the fact that the Government if permitted to do so, intends to dismiss the present indictment, this Court would be acting merely in an advisory capacity if it undertook in this case an examination of the scope of the perjury statute and the perjury rule as applied to a witness' lack of belief in his sworn statement.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 387

WILLIAM WALTER REMINGTON,
Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government's brief in opposition to the petition for certiorari is a second desperate attempt to avoid review by this Court of an indictment which never should have been returned, a trial which never should have been held, and a conviction which the government now substantially admits is based upon evidence which does not establish petitioner's guilt. The first attempt—the hurried new indictment and the motion for leave to dismiss the pending earlier indictment—failed when this Court denied the government's motion on December 11, 1951.

The government's actions speak with far more force than the words of their brief in opposition. By reindicting petitioner for relatively insignificant statements at

his trial (while omitting from the reindictment his oft-repeated denial of membership in the Communist Party) and by seeking a dismissal of the first indictment, the government confessed in action the very wrong done petitioner which it denies in words. Under these circumstances, "the public trust reposed in the law enforcement officers of the Government" (*Young* v. *United States*, 315 U. S. 257, 258 (1942)) would ordinarily have evoked a confession of error in law as well as in fact. Yet, because such a confession of error might have interfered with the government's determination to press its proceedings against petitioner regardless of any action of this Court,* the government has refused to carry out its public trust and its duty to this Court. Instead the government seeks to avoid a review in this Court on the grand jury improprieties by raising unfounded objections to the state of the record (see I *infra*); and on the merits by making contentions completely inconsistent with their earlier admissions in an effort to withstand the force of petitioner's plea for the direction of a judgment of acquittal (see Statement and II *infra*).

Statement

Under the heading "Statement" the government purports to summarize what it describes as "the salient evidence for the Government" on the issue of whether

* The attention of the Court is invited to the government's statement to this effect when seeking to dismiss the first indictment: "No public interest and no genuine interest of petitioner will be served by continuing the present proceedings. He will have to undergo the burden of a trial on the new indictment whether the first indictment is dismissed voluntarily by the Government or on the merits by order of this Court, or whether this Court directs an acquittal." (Memorandum for the United States in Reply to Petitioner's Response to the Government's Motion for Leave to Apply to the District Court for Leave to Dismiss the Indictment, Dec. 1951, hereafter referred to as "Government's Memorandum," p. 15.)

petitioner "well knew and believed" his denial of membership in the Communist Party to be false.

In that summary the government lists seven items as the evidence in the record establishing that petitioner was a member of the Communist Party: (1) that in 1937 petitioner attended closed Communist Party meetings; (2) that in 1937 he attempted to recruit members for the Communist Party; (3) that in 1937 he had access to a post office box allegedly restricted to Party members; (4) that in 1938 he had on two occasions made statements to the effect that he was or had been a member of the Communist Party; (5) that in 1938 he had been active in the Young Communist League; (6) that in 1942 and 1943 he had paid Communist Party dues; and (7) that in 1942 and 1943 he had given secret information to Miss Bentley.

We respectfully suggest that it is pertinent to compare this summary with the directly contradictory statements which the government made in this Court regarding most of the very same evidence only thirty days earlier in replying to petitioner's contention that he would be prejudiced by a dismissal of the indictment at this time because he was entitled to an acquittal. In its reply memorandum filed in this Court on December 5, 1951, the government asserted that petitioner had "no genuine interest" in continuing the present proceeding because an acquittal on the charge that he had lied when he denied ever having been a member of the Communist Party would not constitute *res adjudicata* as to any of the five factual items forming the basis of the new indictment,* saying (Government's Memorandum pp. 8-9, 10-11):

---

* The new indictment is set forth in Appendix A of "Response by Petitioner to Motion by the United States for Leave to Apply to the District Court for Leave to Dismiss the Indictment," pp. i-v.

"* * * Thus, even if petitioner were acquitted of the charge of perjury in having testified before the grand jury that he had never been a member of the Communist Party, such acquittal would not bar his prosecution for committing perjury at his trial in testifying that he had not attended Communist Party meetings, paid Party dues, or asked others to join the Party, that he had not been a member of, or associated with, or aware of the existence of, the Young Communist League at Dartmouth College, and that he had not given anyone not entitled thereto information to which he had access as a government employee."

* * * * *

"Here, no one of the false statements charged in the second indictment, with the possible exception of that relating to payment of Party dues,* could be regarded as having been determined favorably to the petitioner by an acquittal on the earlier charge that he had falsely denied membership in the Communist Party. For example, such an acquittal is not a determination that petitioner never knowingly attended Communist Party meetings. Clearly, attendance at Communist Party meetings is no more precluded by non-membership in the Party than observing a beating is precluded by a determination that the observer did not aid and abet the beating. One might attend meetings for curiosity's sake, or to gain information, or on the invitation of a friend. Similarly, petitioner could have had knowledge of the existence of the Young Communist League at Dartmouth College, or even have associated with it, without having been a member of the Party. And he could have given away secret

* Obviously, if petitioner was not a member, he did not pay "Communist Party dues" as alleged in the second indictment. However, as we think we have clearly shown at pages 44 to 46 of the Petition, the evidence in this record of payments to Bentley does not establish that petitioner was a member of the Communist Party.

> information for many reasons (*e.g.*, for money) unrelated to membership in the Communist Party. * * *"

It is somewhat startling to find the government now listing these very same items among "the salient evidence for the Government" on the issue of whether or not petitioner had been a member of the Communist Party. But of course, having failed in its efforts to avoid the necessity of meeting this issue on the merits, the government had no choice short of admitting petitioner's innocence, for there is no other competent or probative evidence in the case. The only other evidence of membership listed by the government in its "summary" are the petitioner's access to an alleged Communist Party post office box, and the testimony of two witnesses that in 1937-8, when petitioner was a junior at college, he had told them that he was or had been a member of the Communist Party.

As we have amply demonstrated at pages 46-7 of the Petition, the contention that the post office box was a Party box is based on the purest hearsay. In any event, Crouch's testimony that by "a very strict rule" the box was limited to Party members (R. 924) would seem no more "probative" of Party membership than evidence of a rule that the engineer must blow his whistle is proof that he did so on a particular occasion, particularly in view of Crouch's earlier insistence that "There was a general looseness" on organizational matters in the South (R. 822), and that "discipline in the South was extremely lax as compared to the rest of the country" (R. 825), "especially in Tennessee" because of the State organizer's "extreme organizational and political looseness" (R. 908). *cf.* 1 Wigmore, *Evidence*, 3rd Ed. 520 (§92), 534 (§102).

As to the alleged prior oral contradictory statements, as the Court of Appeals correctly ruled, they do not satisfy the rules for proof of guilt in a perjury case (Appendix B to Petition, p. vii). Two witnesses, Ann

Remington, petitioner's former wife, and Robb Kelly, a classmate of Remington's at Dartmouth, testified that during his junior year in Dartmouth in 1937-8, he had told them that he was or had been a member of the Communist Party (R. 184, R. 1432-3). Ann Remington's subsequent testimony on five separate occasions that, to her, membership in the Communist Party meant no more than a "state of mind" (R. 200, 202, 206, 283, 294) would seem to dispose of her testimony. Robb Kelly's attempt to remember, thirteen years later, the exact language used by Remington at an undergraduate "bull session" is the best argument in support of the rule relied on by the Court of Appeals. How could Kelly, in 1950, remember whether in 1937 Remington had said "I am a Red", or even "I am a Communist" (either of which he might well have said at that time and under those circumstances), instead of "I am a member of the Communist Party"? (R. 1432-3).

Thus, even if all the "facts" recited by the government were established by the evidence, there would still be no evidence in this case inconsistent with petitioner's innocence.

But before leaving the subject of the government's "Statement" we do not wish by our silence to create the impression that we concede that the evidence in the case does sustain the statement of facts as therein set forth. For example, at pages 4-5, the government seeks to create the impression that the evidence in the record establishes petitioner's regular and continued attendance at Communist Party meetings. What the government fails to point out is that Kenneth Malcombre and his wife, Betty Malcolm, in whose presence all of the alleged meetings are said to have taken place, did not arrive in Knoxville until the middle of June, 1937 (R. 582-3, 472), less than two

weeks before petitioner permanently left Knoxville, on June 28th, 1937 (R. 2483, 1887-8).*

Similarly, at page 8, the government refers to the famous formula for manufacturing rubber out of garbage as "top secret". The affirmative evidence is that this "formula" was never classified either as "top secret", "secret", "confidential", or even "restricted" in accordance with the rules regarding wartime classified information (R. 3536-8, 3566-73, 3582-90, 3636-39, 3675-82). Actually the evidence is quite clear that the entire subject was a well known and commonly discussed joke (R. 2312-5, 3532-43, 3554-3602a, 3629-39, 3666-81), as petitioner has throughout contended. (See also Nelson, "The Arsenal of Democracy", 1946, pp. 299-300).

In many other respects, we believe and shall demonstrate if this petition is granted that the evidence falls far short of sustaining the government's recital. But for present purposes, it is sufficient to point out that it is now abundantly apparent, largely on the basis of the government's own admissions, that the "salient evidence for the Government", even if taken at face value as recited by the government itself, does not sustain the basic charge that petitioner had been a member of the Communist Party. Clearly he is entitled to an acquittal.

I.

The government has wholly failed to respond to petitioner's basic contention that the transformation of a federal grand jury into a vehicle of private prosecution re-

* In view of the stress laid by the government on the evidence regarding these meetings, which is now for the first time advanced as "direct" evidence of membership (Brief, pp. 19-20), we shall deal with it in more detail when discussing "direct evidence", hereafter.

quires the dismissal of an indictment voted by that grand jury.

In petitioner's Response to the Government's Motion to Dismiss (p. 3), we set forth the following summary of the facts upon which we base our contention that the indictment was unconstitutionally procured:

> (1) At the time of the indictment, the foreman of the grand jury, one John Brunini, was collaborating with chief prosecution witness Bentley in the preparation and publication of a book of memoirs (R. 1598-1607), the success of which depended upon the rehabilitation of her credibility through Remington's indictment.
>
> (2) The prosecution's case was presented to the grand jury by Thomas E. Donegan, a Special Assistant to the Attorney General (R. 1515-16, 1522-4), who had previously been Bentley's personal attorney in litigation arising out of her espionage activities (R. 1388-90, 1280-5).
>
> (3) One of the first witnesses before the grand jury was Joseph A. Egan, Bentley's present personal counsel, who had represented Bentley in the libel suit brought against her by Remington (R. 1391, 1496) and whose testimony could only have been incompetent and prejudicial since he did not know Remington.
>
> (4) Foreman Brunini and prosecutor Donegan interrogated Remington, during a five-day grilling before the grand jury (R. 2664), on matters many of which were wholly unrelated to any crime, but directly related to the public dispute between Bentley and Remington as to whether he had ever been a member of the Communist Party (R. 1515-16), and finally indicted him for denying such membership.

The most significant thing about the government's brief in opposition is the failure to deny a single word of this summary* or to answer or even mention petitioner's contention that the grand jury was thus turned into a vehicle of private prosecution contrary to the Constitution and the decided cases (Petition, pp. 22-27). Instead, the government seeks to divert the Court from this basic issue involving the integrity of the judicial process into an inquiry whether petitioner has proved that Brunini had a financial interest (as distinguished from his admitted personal interest) in sending Remington to jail. The attempted diversion is without merit.

Two wholly disinterested witnesses testified for the defense that Brunini did have a financial interest in Bentley's book (R. 1537-1546, 1579-82; 1600, 1610, 1611). Although neither of them had seen the signed contract containing Brunini's financial interest, both of them testified unequivocally that the publishers and Bentley had told them of Brunini's financial interest, and one witness testified to the destruction of the contract (R. 1593-4). Surely, after such accusations are made, petitioner is not required to call the accused persons as his own witnesses, and expect them to publicly confess their own wrongs. The burden of going forward was clearly on the government to call the witnesses, two of them were in the court-

* The government suggests (pp. 14-15) that petitioner has failed to prove the allegations in his affidavit that Brunini and Donegan had grilled him for five days on subjects wholly unrelated to any possible wrongdoing by him and directly related to his public dispute with Bentley. But the government does not deny that the facts stated in the affidavit are true even though they have seen the minutes of the grand jury. In any event, the grand jury minutes were reluctantly sealed into the record by the trial court and are available to this Court, thus removing any question of the adequacy of the record on this point (R. 3132, 3138).

room (R. 1585-1587)* as was Bentley's personal counsel (R. 1495) and the third of whom, Brunini, was certainly available, to contradict the accusation if they could, and subject themselves to cross-examination. This is particularly true since the government refused to produce the "full narrative of these incidents" which it had in its possession (R. 1526-7). The government's statement that, despite the clear evidence in the record, the United States Attorney's office remains of the *opinion* that at no time did Brunini have a financial interest in the book (Brief, p. 16) must be considered in the light of their continued failure to make the "full narrative" available—even now in this Court.

Nor is it important whether Brunini had a binding legal contract setting forth a specified financial percentage in Bentley's royalties, or only an offer of the customary financial interest of any editor which he rejected out of guilt for his own wrongdoing. Brunini was Bentley's unstinting collaborator and his identification with her would be as great in the one case as in the other; the use of the grand jury as a vehicle for private malice would be no different. Indeed, Brunini himself has been more frank about his personal identification with Bentley and her charges than is the government in its opposition; in this connection the Court's attention is respectfully called to Brunini's article in SIGN magazine for September, 1951, entitled, "Smoke Screens for Subversives."

Here, indeed, we have the strongest possible case of the private prosecutor intruding into the grand jury room: a professed but unpunished criminal and her collaborator,

* The government suggests (p. 13) that petitioner should have called the publishers to the stand because he had one of them under subpoena. But the subpoena had been issued to obtain the contract which was substituted for the destroyed one (R. 1495) and which petitioner actually introduced in evidence (Ex. W, R. 1380).

the foreman of the grand jury, together with her past and present counsel, work in the grand jury room to bring about the indictment for perjury of the person who dared to call her a liar. Yet the government avoids this basic issue and talks of "legal qualifications" and Rule 6(b)(2). Petitioner is not objecting to the absence of Brunini's "legal qualifications"; the offense is to the judicial process in the transformation of the grand jury room into a private prosecution. The record being clear and undenied on this point, there is certainly no need for bringing 22 grand jurors into a court of law and asking them whether they were subjected to "undue influence". It is the irresponsible nature of the grand jury rather than proof of actual prejudice which is determinative (Petition, pp. 22-27).

II

The government appears to be in substantial agreement with our contention (Petition, pp. 33-42) that it is necessary in a perjury case to prove that the defendant lied in fact and that the court below erred in holding that such proof is unnecessary. The government relies, in its effort to avoid review by this Court and the acquittal of petitioner, upon the contention that the difference between the correct rule and that laid down by the Court of Appeals "is actually more of phraseology than reality" (p. 20) and that the record contains "direct" evidence of petitioner's membership in the Communist Party.

At the trial, the United States Attorney refused to state what items of proof he contended were "direct" evidence. In the Court of Appeals the government for the first time disclosed the items of evidence which it contended were "direct"—the testimony regarding the

mailbox and the alleged payment of dues (see Petition, Appendix B, p. ix). These items having been shown to be far from "direct" evidence in the petition for certiorari (pp. 44-48), the government has at this late stage in the proceedings added, and now principally relies upon, a third category of so-called "direct" testimony, namely, attendance at meetings.

The government's present position that the testimony concerning attendance at meetings is "direct" evidence of membership is not only inconsistent with the position of the government before the Court of Appeals—where there was no suggestion that the alleged attendance at meetings could possibly be "direct" evidence (Petition, Appendix B, p. x) —but is even inconsistent with the government's memorandum in support of their motion to dismiss filed in this Court only thirty days ago. There, as we have already pointed out, the government flatly stated that "attendance at Communist Party meetings is no more precluded by non-membership in the Party than observing a beating is precluded by a determination that the observer did not aid and abet the beating. One might attend meetings for curiosity's sake, or to gain information, or on the invitation of a friend" (Government's Memorandum, p. 10). Petitioner concurs.

Even now, in its brief in opposition, the government takes an equivocal position on this very question. Although relying primarily on alleged attendance at Communist Party meeting as "direct" evidence, the government admits that "Mere attendance at one or two meetings conceivably might not be considered sufficiently direct since conceivably an outsider might be allowed to attend a closed meeting" (p. 20). But, as we have shown, p. 6, *supra,* the government failed to point out to this Court that the alleged meetings of necessity occurred within the

period of less than two weeks immediately preceding petitioner's permanent departure from Knoxville on June 28, 1937 (R. 2483, 1887-8). Since meetings are usually held every two weeks (R. 717, 777, 473), this would seem to refute any possible contention of "regular" or "repeated" attendance at meetings. The government is thus relying for "direct" evidence on testimony that petitioner attended one or two meetings fifteen years ago when he was 19 years old—testimony which it has in the past and still concedes is not proof of membership at all.*

Petitioner might well let the matter rest there. But, in view of the government's sudden reliance on this "attendance" testimony as "direct" evidence and in view of the misleading presentation in the government's statement of the testimony concerning meetings given by Malcombre, Benson and Bridgman, we set forth their testimony in some detail. We submit that an examination of this testimony will conclusively show that it not only does not satisfy the requirements of "direct" evidence under the perjury rule, but that it is not even probative evidence in any respect.

McConnell was the organizer, who, as we have seen, arrived in Knoxville on or about June 15, 1937, two weeks before Remington left (R. 582). He testified as to a single meeting called at night in a public park, but he had no personal recollection as to how the meeting was called. When asked whether he had personally asked anyone to

* Petitioner's wife swore that during the entire time that she knew him, from the spring of 1938 until long after the period during which he is alleged to have been a member of the Communist Party, they never attended any Communist Party meetings—with the exception of some meetings which she alone attended at Croton, N. Y., while he was still at Dartmouth (R. 437, 296-8, 364).

attend, he replied "I must have told someone because the meeting took place" (R. 596). Although as a section organizer (R. 603) who was his own secretary (R. 677), he was the official who would have issued membership books, collected dues, issued dues stamps, and transfer papers when petitioner left Knoxville (R. 608, 676, 683), he admitted that he had never seen any membership card belonging to petitioner, never collected dues from him, issued stamps (R. 676-7) or issued any transfer papers (R. 683-4). When asked how then he could state that petitioner had been a member of the Party, he replied: "Save by saying that my relations with Mr. Remington were those of fellow * * * members of the Communist Party" (R. 684-5). In other words, McConnell's testimony regarding petitioner's attendance at the meeting was not even considered by him to constitute proof that petitioner was a member of the Party.

McConnell did not corroborate either Benson or Bridgman as to the meetings held at his wife's house, for he testified that he had not attended any meeting at his wife's house (R. 685).

Although Christine Benson testified that she had seen petitioner at Betty Malcolm's house, she refused to swear that he had been a member of the Party, saying, "I haven't stated definitely that I knew him to be a member. I stated definitely that I attended some meetings with him" (R. 496). On two occasions she admitted that it was possible for non-members to attend such meetings (R. 526-8, 536-7).

Bridgman likewise sought to place petitioner at meetings in Betty Malcolm's house, although he did not place Christine Benson at such meetings (R. 717, 770), nor, for that matter, did she place him at such meetings (R. 487-8).

The fact is that Bridgman did not testify that to his knowledge petitioner was a member of the Communist Party or that the meetings were "limited to members". Moreover, before the indicting grand jury, in May and June of 1950, Bridgman had insisted that the meetings which he and petitioner had attended were held at Betty Malcolm's house in the winter or early spring of 1937 (R. 710-717). When he was later recalled before the grand jury, he stated that he could not remember petitioner at any meetings except the "early meetings" at Betty Malcolm's house (R. 947, 947a). When confronted with proof that Betty Malcolm had not arrived until June 17, 1937 (R. 948), he told the grand jury that he was "floored" (R. 950). At the trial on January 3, 1951, he testified that since he had been "floored" by this disclosure seven months earlier, F.B.I. agents had seen him approximately once every week or two weeks in Massachusetts, where he lived, to discuss this discrepancy in his testimony (R. 716, 718, 950) and had even driven him around Knoxville, Tennessee, in September, 1950, in an effort to refresh his recollection (R. 718-20). Yet, even with all this assistance, Bridgman was still unable to reconcile this glaring discrepancy in his testimony.

The recital of the testimony concerning petitioner's alleged attendance at Communist Party meetings conclusively refutes the government's new-found position that this testimony constitutes "direct" evidence of membership. Even more significantly, the recital demonstrates the wisdom of this Court's statement in *American Communications Assn.* v. *Douds*, 339 U. S. 382, 410-411 (1950) that "in proving that one swore falsely that he is not a Communist, the act of joining the Party is crucial." Here the government has conceded that it has no evidence that defendant ever committed an act of joining (R. 3970); its

efforts to substitute for such evidence vague testimony concerning one or two meetings held 15 years ago when petitioner was 19 years old illustrates the dangers if the rule laid down by this Court is ignored.

Conclusion

If we are correct in our basic contention, with which the government appears to be at least tacitly in agreement, that it is necessary in a perjury case to prove objective falsity, we submit that on this record petitioner is clearly entitled to a judgment of acquittal. For it must now be apparent, in large part on the basis of the government's own admissions, that this petitioner has been prosecuted and convicted of perjury for denying that he had ever been a member of the Communist Party on the basis of evidence which does not prove that he had ever been such a member. Indeed, in apparent realization of this, the government has sought to avoid meeting the issue on the merits, first, by attempting to drop this indictment, and secondly, by failing to include in the new indictment a charge based on petitioner's denial of membership.

One would suppose, under these circumstances, that the government would freely admit that petitioner was innocent of the crime of which he had been convicted, and join in petitioner's prayer that this Court direct the entry of a judgment of acquittal. Instead, the government has taken the extraordinary position that the defendant is not even entitled to insist upon a judgment of acquittal:

> "No public interest and no genuine interest of petitioner will be served by continuing the present proceedings. He will have to undergo the burden of a trial on the new indictment whether the first indictment is dismissed voluntarily by the Govern-

ment or on the merits by order of this Court, or whether this Court directs an acquittal" (Government's Memorandum, p. 15).

For six years this petitioner has exhausted his resources in seeking to clear his name of the false accusation that he had been a member of the Communist Party. Now that the government substantially concedes that he spoke the truth, it seeks to deprive him of his right to obtain such vindication because, they say, they may be able to put him in jail anyway: while defending himself from the false accusation of having been a member of the Communist Party, he denied various allegations (generally of a relatively minor nature, and on the government's own admission immaterial on the issue of petitioner's guilt or innocence here), as to which the government hopes it may be able to obtain direct contradictory testimony, duly corroborated as required under the perjury rule. No doubt another year of weekly and bi-weekly meetings with the F.B.I. may have helped Bridgman to "remember" further details regarding petitioner's activities in Knoxville fifteen years ago—just as, after the settlement of petitioner's libel suit, Bentley "remembered" many details which she had been unable to recall during previous public testimony (R. 1185-6, 1218, 1226, 1299-1300; for specific instances, *e.g.*, see R. 1214-5, 1198-1200 and 1194, 1185-8).

However that might be, the government has made it quite clear that in its view, as long as it can put William Walter Remington to his trial for something, it is a matter of no importance whether or not he was wrongly convicted of perjury for denying that he had ever been a member of the Communist Party.

We respectfully submit that not only the interests of simple justice to this petitioner, but the public interest

in the proper administration of justice, require that this Court take cognizance of such vindictive persecution. Under civilized standards of justice an innocent man who has been wrongly convicted of a heinous offense, and whose name has been bandied about throughout the length and breadth of the country as something little less than a traitor, is entitled at the very least to judgment of his innocence of that offense.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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